DIGEST

OF THE

DECISIONS OF THE COURT OF APPEALS

KENTUCKY:

1866 TO 1876.

EMBRACING

1ST, 2D, 3D, 4TH, 5TH, 6TH, 7TH, 8TH, 9TH, 10TH, & 11TH BUSH.

BY

WILLIAM W. TRIMBLE,

COVINGTON, KENTUCKY.

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PREFACE.

The present work embraces that portion of the OPINIONS OF THE COURT OF APPEALS of Kentucky published in the ten volumes of BUSH'S REPORTS and to be published in the 11th volume of same; and covers ten years of most important time—1866 to 1876.

In submitting it to the bar of Kentucky, it is impossible for me not to feel great diffidence and solicitude as to its merits and reception. The plan is, in one particular, entirely new; but is believed to be in accordance with the method usually pursued by lawyers in examining legal questions—to begin with the last volume of Reports, and go back through them, in the reverse order of their publication. This is the easiest way, and saves labor.

All of the Overruled Cases, or parts of cases—all modifications of rulings—all changes of the various shadings of opinions, within the period of the Reports digested—will be seen without especially devoting a chapter thereto.

Wherever the General Statutes have changed the law as announced by the courts, or repealed or modified the previous statutes, the matter is noted. And the statutes and principles of the cases are so fully stated, that the work, it is hoped, will be found to be something more than an index.

In digesting 9th and 10th Bush and the cases which are to be embraced in 11th Bush, I have had the valuable assistance of Messrs. RICHARD H. COLLINS (the Author of the new "History of Kentucky") and his son, LEWIS COLLINS—both of them members of the Covington bar. To the former—whose accuracy and fidelity in this regard have been tested by thirty years' experience—I committed the supervision and publication of the work.

The object of the Author is to lessen the labors of the members of the legal profession of this State, and if he succeeds in doing so he will feel amply rewarded.

W. W. TRIMBLE.

COVINGTON, KY., Feb. 15, 1876.

JUDGES OF THE COURT OF APPEALS.

	TERM OF OFFICE.	WHEN CHIEF JUSTICE.
BELVARD J. PETERS—	August, 1860, to August, 1868	August, 1866, to August, 1868.
RUFUS K. WILLIAMS—	August, 1862, to August, 1870	August, 1868, to August, 1870.
GEORGE ROBERTSON—	August, 1864, to Sept. 5, 1871*	August, 1870, to Sept. 5, 1871.
MORDECAI R. HARDIN—	August, 1866, to August, 1874	August, 1872, to August, 1874.
BELVARD J. PETERS—	August, 1868, to August, 1876	August, 1874, to August, 1876.
WILLIAM LINDSAY—	August, 1870, to August, 1878.	
WILLIAM S. PRYOR—	Sept., 1871, to August, 1872	Sept., 1871, to August, 1872.
WILLIAM S. PRYOR—	August, 1872, to August, 1880.	
MARTIN H. COFER—	August, 1874, to August, 1882.	

* Resigned.

W. P. D. BUSH, Reporter, 1866 to 1878.

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DECISIONS OF THE COURT OF APPEALS

OF

KENTUCKY,

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ABATEMENT.

See INDICTMENT.

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1. Plaintiff in attachment must make proof of non-residence of defendant, where that is the ground upon which attachment is sued out; and also file affidavit that defendant has no personal property, before judgment is rendered for sale of real estate. *Jackson* v. *McElroy, &c.*, 2 Bush, 132.

2. During absence of defendant, his land was sold at a sacrifice, and plaintiff in the judgment became purchaser, and was put in possession after the sale was confirmed. The judgment of sale was reversed; and thereupon defendant filed petition to set aside sale, under 7 subdiv., sec. 597, of Civil Code, and sale was set aside. *Yowell* v. *Gaines*, 2 Bush, 211.

ACCEPTANCE.

Acceptance of a mortgage, or something equivalent to such acceptance, is essential to its validity, and will not be presumed from delivery merely. *Bell* v. *Farmers' Bank, &c.*, 11 Bush (Feb. 15, 1875).

ACCESSORIES.

1. At common law, and under the statute of Kentucky inflicting punishment on accessories, it devolves on the Commonwealth to show the guilt of the principal felon before a conviction of the accessory can be had. An indictment against an accessory must contain such allegations as to the commission of the crime and the guilt of the principal as would make it a good indictment against the principal. It must be alleged and proven that the accessory knew that the principal felon had committed the felony; and it is equally as essential to allege in the indictment the guilt of the principal. *Tully* v. *Commonwealth*, 11 Bush (April 17, 1875).

2. A judgment shall be arrested only where the indictment does not charge a public offense. (Sec. 271, Criminal Code.) *Tully* v. *Commonwealth*, 11 Bush (April 17, 1875).

ACCIDENT.

1. See DAMAGES.

2. The "accident" of the sudden illness of an attorney, which prevented his attendance in court at the trial of a suit against a resident and a distant client (of whom he was sole attorney for the latter, and had a valid defense), is a sufficient excuse for a technical default, and good ground for a new trial. *Triplett* v. *Scott*, 5 Bush, 81.

ACCOMPLICES.

1. A person merely present, aiding and abetting in the willful and malicious shooting at and wounding another with intent to kill, is not liable to the same punishment as the person commit-

ting the act. (Sec. 2, art. 6, chap. 29, Gen. Stat.; Stamper v. Commonwealth, 7 Bush, 622.) *Bland* v. *Commonwealth*, 10 Bush, 622.

2. The several persons present at a homicide may be guilty in different degrees, as one of murder, another of manslaughter. *Mickey* v. *Commonwealth*, 9 Bush, 593.

3. One cannot be convicted of murder as an aider and abettor of others who committed the deed, unless he had confederated with them to attack or commit a felony, or that, knowing their malice, he aidcd or encouraged them. *Mickey* v. *Commonwealth*, 9 Bush, 593.

ACCORD AND SATISFACTION.

1. Compounding a debt between a creditor and his failing debtor, where there is no fraud nor unfair concealment, is upheld as being upon a sufficient valid consideration; especially where the amount is secured by another name, or there is a transfer of obligations on other persons for the amount agreed on. *Ricketts* v. *Hall, &c.*, 2 Bush, 249.

2. It is only when unfair concealment or fraudulent conduct induces a party to receive a less sum than is actually due him, that courts interpose against the compromise of causes of litigation. *Pepper & Watson* v. *Aiken, &c.*, 2 Bush, 251.

3. A collusive release obtained *pendente lite* can be of no avail against an attaching creditor. *Cain* v. *McHarry*, 2 Bush, 263.

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Riparian proprietors of lots originally fronting on the Ohio river are entitled to the land added thereto by accretion; to be ascertained by extending the original river frontage of the respective lots as nearly as practicable at right angles with the course of the river to the thread of the stream. *Miller, &c.* v. *Hepburn*, 8 Bush, 326.

ACQUIESCENCE.

1. The waiver of a forfeiture may be inferred by the failure of the party entitled to the estate to re-enter or assert some claim

in a reasonable time after the termination of the estate. *Kenner, &c.* v. *American Contract Company*, 9 Bush, 202.

2. Remaining passive does not deprive a party of the right to seek relief, unless in addition thereto he does some act to induce or encourage others to expend their money or alter their condition, and thereby renders it unconscientious for him to enforce his claim. No such act upon the part of the company is shown in this case. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

3. The presumption of acquiescence was not raised against the corporation, by the rejection of a proposition of the purchaser to surrender with conditions attached to it, which the corporation was not legally or morally bound to accept. *Cov. & Lex. R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

ACT OF GOD.

The claimant of an attached horse, coming in as a third and unsued party, obtained possession of the horse by giving bond and security as provided by sec. 235, Civil Code, that he would perform the judgment of the court, or have the horse forthcoming subject to the order of the court. Judgment being rendered against the asserted right of the claimant, he is liable on his bond, notwithstanding the death of the horse during the litigation, which was protracted by his wrongful assertion of title to the horse. *Dear* v. *Brannon*, 4 Bush, 471.

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I. For what an action will lie.
II. For what an action will not lie.

I. FOR WHAT AN ACTION WILL LIE.

1. See STATE OF KENTUCKY; and PARTIES.

2. Where a bank refused to transfer stock on its books in accordance with a written power, thereby impairing its value, owner may consider it a conversion and recover its value. *Bank of America* v. *McNeil*, 10 Bush, 54.

3. Where a new and distinct cause of action is set out in an amended petition, summons must be issued and served on defendant. *Cecil* v. *Sowards, &c.*, 10 Bush, 96.

4. A suit under the act of March 10, 1856, to set aside a fraudulent conveyance, is not instituted by simply filing petition within six months, but summons must also issue within that time. *Cecil* v. *Sowards, &c.*, 10 Bush, 96.

5. Section III of the Civil Code was not intended to make the rules of practice more technical and restricted than before its adoption. *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

6. Under the old style of pleading, an action for negligence or fraud would have been in form *ex delicto*. *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

7. In the same petition may be joined a cause of action on a contract, and a cause of action for fraud or negligence directly connected with the contract. *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

8. The corporation itself should sue its officers for misconduct; but if the corporation be in the hands of such officers, the stockholders may sue. Such suit must be in equity, though founded on tort; they have no right to sue at law. (2 Atkins, 400; 3 Paige, 230.) *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

9. A lessee may maintain an action in his own name against his sub-lessee and his assignee, on the covenants of such sub-lessee to pay rent to him. *Trabue* v. *McAdams*, 8 Bush, 74.

10. A lessee, being sued for rent, may prosecute a cross-action against his assignee to compel him to discharge the rent and release him from responsibility. *Trabue* v. *McAdams*, 8 Bush, 74.

11. A personal action may be maintained in the State courts by the owner of one boat against the owner of another boat, to recover for damages occasioned by a collision of their boats on the Ohio river. *Digby, &c.* v. *Kenton Iron Co.*, 8 Bush, 166.

12. Right of action is not waived by failure to plead it as a defense. The defendant may after judgment, by appropriate suit, assert any cause of action he may have had against plaintiff, although he might have used such cause of action as a counter-claim or set-off, but failed to do so. *Emmerson's adm'r*

v. *Herriford*, 8 Bush, 229. (Chinn v. Mitchell, 2 Met., 92; Ross v. Ross, 3 Met., 274; Moss v. Rowland's ex'r, 1 Duvall, 321.)

13. A Confederate officer may maintain an action for the value of the use of his real estate against a party who acquired and held possession thereof, during and after the war, through the form of a purchase under an illegal judgment. (*Louisville & Nashville R. R. Co.* v. *Buckner*, 8 Bush, 277.

14. Holder of an unaccepted check on bankers may maintain an action against them for non-payment on presentation and demand, where the drawer had a sufficient deposit to pay the check, and notice given to the bankers that it was drawn upon funds in their hands belonging to drawer. *Lester & Co.* v. *Given, Jones & Co.*, 8 Bush, 357.

15. A party seeking to obtain remedy by attachment under section 474 of Civil Code, must show return on *fi. fa.* of "no property found," and allege and show that the *fi. fa.* was directed to the county where the judgment was rendered, or to the county of defendant's residence. *Maddox, &c.* v. *Fox, &c.*, 8 Bush, 402.

16. Money fraudulently coerced by judgment and paid after being replevied, can be recovered in equity without awarding a new trial of the common law action, or setting aside the judgment therein. *Ellis* v. *Kelly*, 8 Bush, 621.

17. When a party, by some act or declaration out of the record, lulls his opponent into a false security, or by any other means deceives him, and thereby obtains a judgment or decree to his prejudice, the judgment or decree thus obtained is fraudulent and may be set aside on that ground. (Brunk v. Means, &c., 11 B. Mon., 214.) *Ellis* v. *Kelly*, 8 Bush, 621.

18. Before action can be maintained against tenant or *quasi* tenant, demand of possession must be made. But this does not apply where party in possession claims the fee. *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

19. Party having legal title and possession of land may maintain action against any person claiming it, to quiet his title, in the circuit court of the county where the land or some part of it may lie. (Sec. 93, Civil Code; act March 9, 1854, 2 Stanton, 102.) *Landrum* v. *Farmer*, 7 Bush, 46.

20. Action for charge of incest, adultery, etc., against female, special damages need not be alleged or proved.

For seduction, allowed without allegation or proof of loss of service.

For wrongful distress of property, allowed without allegation or proof of malice.

For striking with colts, brass knucks, etc.

City liable for acts of mob. General Statutes, 141.

In favor of widow or minor children of person killed by wanton or malicious use of fire-arms, etc.

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Against person owning animal with glanders. Gen. Stat., 142.

Actions which survive. Gen. Stat., 179.

Persons killed or injured by railroads. Gen. Stat., 550, 551.

Actions which must be brought in twelve months. Gen. Stat., 631.

21. Party may waive his right of action against the sheriff, and bring it against the deputy, for breach of a direct covenant to the party suing. *Winterbower* v. *Haycraft*, 7 Bush, 57.

22. Action to revive a judgment is a suit. (Civil Code, sec. 437.) *Curry's adm'r* v. *Bryant's adm'r*, 7 Bush, 301.

23. Indorser's right of action accrues when he pays the bill, and arises on the implied liability resulting from payment against any party liable to contribute to payment of the debt. *Bowman* v. *Wright*, 7 Bush, 375.

24. Action in equity may be brought in any county on a justice's judgment, after return of "no property," for the discovery of money, choses in action, etc. (Civil Code, sec. 474.) *Austin* v. *Payne, &c.*, 7 Bush, 480.

25. Surety paying debt may sue co-surety separately or as joint defendant with principal, when and as often as he makes payment. (Gen. Stat., chap. 104, sec. 8, page 797.) *Robinson* v. *Jennings*, 7 Bush, 630.

26. The remedy against delinquent subscriber for stock in a corporation is to enforce payment by judgment for money, and not by forfeiture or sale of the stock. (16 B. Mon., 5; 2 Met., 314.) *Gill's adm'x* v. *Kentucky & Colorado Gold & Silver Mining Co.*, 7 Bush, 635.

27. Right of action for personalty on the death of the party vests in his personal representative. *Hull* v. *Deatly's adm'r*, 7 Bush, 687.

28. The owner of land may maintain an action for a forcible entry and trespass of land in the possession of a tenant. *Holderman* v. *Middleton*, 6 Bush, 44.

29. Suit for recovery of land and damages for detention, the judgments for the land and for rents are distinct and separate. One is enforced by *habere facias* and the other by *fieri facias*. The judgment for rent depends on the recovery of the land; and if the judgment for the land is right, an error as to the damages is no reason for disturbing the judgment for the land. *Shean* v. *Cunningham*, 6 Bush, 123.

30. An assignee in bankruptcy may maintain an action to recover any property which might have been subjected by the bankrupt's creditors if he had not become a bankrupt. *Shackleford, assignee, &c.* v. *Collier, &c.*, 6 Bush, 149.

31. Lessees of Hawes' heirs mined and removed coal from under the streets of Hawesville, and paid the heirs rental for same. The trustees of the town being the owners of the streets might waive the tort, and sue the heirs for rent received by them. *Trustees of Hawesville* v. *Hawes' heirs*, 6 Bush, 232.

32. Action for conversion of slaves or personal property bequeathed by testator, must be brought in the name of the personal representative. *Pendleton's ex'r, &c.* v. *Pendleton's adm'r*, 6 Bush, 469.

33. A refusal to permit the performance of service for a year is not equivalent to performance. *Wood* v. *Morgan*, 6 Bush, 507.

34. The husband is liable for the simple torts of the wife, committed during coverture, as trespass, slander, etc., although the injury may in some form involve the commission of a fraud. If injury be committed in husband's presence, he alone should be sued. If he is not present when the injury is done, both should be sued. *Curd* v. *Dodds, &c.*, 6 Bush, 681.

35. Action by surety in note or bond, for money paid thereon by him, is upon account. Such action being against personal representative, the affidavits required by law should be made to the account; and if made to the note or bond, are insufficient. *Nutall's adm'r* v. *Brannin's ex'rs*, 5 Bush, 11.

36. Reversioners may sue for and establish claim to land, during lifetime of tenant for life, &c., to be made available when they will be entitled to the use of the estate. *Simmons, &c.* v. *McKay, &c.*, 5 Bush, 25.

37. Where a party receives a conveyance of land, the consideration of which is paid by another under an agreement that the grantee will hold it in trust for the party who paid the money, although the trust cannot be enforced, the money can be recovered. *Martin* v. *Martin, &c.*, 5 Bush, 47.

38. To recover treble the amount of the money lost by a third party at a gaming table, the name of the relator should be joined with the Commonwealth. *Perrit* v. *Crouch and the Commonwealth*, 5 Bush, 199.

39. Two actions on the same ground in equity and at law, plaintiff may be compelled to elect which he will prosecute. *Cleveland's adm'r* v. *Lyne, &c.*, 5 Bush, 383.

40. Issuing the summons is the commencement of the action, by Code. *Butts* v. *Turner & Lacy*, 5 Bush, 435.

41. Surety's right of action against his principal does not accrue until he pays the debt. The statute of limitations does not commence to run from the time he replevies it; nor until he pays the debt. *Hikes* v. *Crawford & Long*, 4 Bush, 19.

42. "It is not so!" "It's not so—no such thing!" These words being used by a party to a suit on trial before a justice of the peace, in reply to answers made by a witness who was being cross-examined by him, are actionable. The words are susceptible of an innocent and an offensive meaning, and their determination was properly left to the jury. *Dedway* v. *Powell*, 4 Bush, 77.

43. If the plaintiff or his attorney, before judgment, either directly or indirectly, puts a party who is not liable for the debt sued on, off his guard, or prevents him from defending the action, such conduct entitles the party injured to relief. *Hayden, &c.* v. *Moore*, 4 Bush, 107.

44. A suit may be maintained in behalf of a congregation in reference to the church property, by the trustees of the church, or by a committee appointed by the congregation for that purpose. *Humphrey, &c.* v. *Burnside, &c.*, 4 Bush, 215.

45. The right of a creditor to sue heirs and devisees of decedent in equity given by sec. 10, art. 1, chap. 44, Gen. Stat., 490. *Johnson, &c.* v. *Belt*, 4 Bush, 405.

46. Payment of note extorted by military arrest being coerced by military duress, the law implies a promise to make restitution, and assignor and assignee are jointly liable. Although they had no agency in extorting the note or coercing payment, each was apprised of the want of a valuable or legal consideration. *Voiers and Parker* v. *Stout*, 4 Bush, 573.

47. Action of assumpsit may be maintained for value of property tortiously taken and converted, and that which may be recovered may be plead as a set-off. *Eversole* v. *Moore*, 3 Bush, 49.

48. A constable is liable for a wrongful seizure of property; and a bond which contains no covenant to pay the claimant of any property seized and sold under a distress warrant, the damages sustained by such claimant, as prescribed in sec. 709, Civil Code, presents no bar to an action against the constable for the seizure and sale. *Jewell* v. *Mills, &c.*, 3 Bush, 62.

49. A constable has no right to force open an outer door or window which is closed and fastened, to levy a *fi. fa.* or distress warrant. *Jewell* v. *Mills, &c.*, 3 Bush, 62.

50. The wife's right, she being a mother, to prosecute an action in her husband's name in case he abandons his family, does not depend on his consent, but is free from his control. (Civil Code, sec. 51.) *Stith* v. *Patterson*, 3 Bush, 132.

51. Neither fraud, nor warranty, without rescission by return or tender of the slave to the vendor, entitles the vendee to bar the action for the price. *Miller* v. *Gaither*, 3 Bush, 152.

52. The vendee of personal property, in an action for the price, is entitled to a recoupment of the damages resulting from a failure of the consideration. (6 B. Mon., 528; 12 B. Mon., 465.) *Miller* v. *Gaither*, 3 Bush, 152.

53. An order for part of the amount of a judgment is not an assignment thereof, but evidence of indebtedness which may be enforced on refusal to accept or pay the order. *Thomas* v. *Porter*, 3 Bush, 177.

54. False affirmations, tinged with actual fraud, are excepted from the operation of the statute, and should always be action-

able without written evidence. (2 Duvall, 156.) *Dent* v. *McGrath*, 3 Bush, 174.

55. A suit, brought to correct errors on the face of the decree, and to perfect the title which it purports to pass, may be considered in the nature of a bill of review. *Peak, &c.* v. *Percifull, &c.*, 3 Bush, 218.

56. Trespass may be maintained against any one entering on a sand bar in the Ohio river which is private property, and removing sand from it. *Berry* v. *Snyder, &c.*, 3 Bush, 266.

57. G. loaned M. pork, which he agreed orally to return at the expiration of three years. No suit can be maintained to enforce the contract; but to enforce the implied promise created by law to pay the consideration received, a suit can be maintained. *Montague* v. *Garnett*, 3 Bush, 297.

58. Parol contracts not to be performed in one year are not void. The defendant may use it as a shield, the same. There is an evident distinction between contracts executed in part or whole, and one wholly to be executed by both parties. (Roberts v. Tennell, 3 B. Mon., 347.) *Montague* v. *Garnett*, 3 Bush, 298.

59. An executor *de son tort*, is to be sued, and is liable as other executors; and defenses to their individual claims can be used as though they were rightful executors. *Finnell* v. *Meaux*, 3 Bush, 449.

60. The circuit court has jurisdiction to order a sale of a house and lot which is not susceptible of division, on the petition of one party, although the other joint owners protest against it. (Sec. 6, art. 5, chap. 63, Gen. Stat.; Myers' Sup., 751.) *Burgess* v. *Eastham*, 3 Bush, 476.

61. When a sheriff transcends his powers in selling land under execution, and the sale is quashed or set aside, the commissions received by him for making such sale may be recovered back in an action against him. Limitation against such action will not begin to run until the sale is set aside or quashed. *Shropshire, &c.* v. *Pullen*, 3 Bush, 512.

62. The Commonwealth can maintain an action on a sheriff's bond for official delinquency in criminal cases. *Commonwealth* v. *Reed, &c.*, 3 Bush, 516.

63. An execution defendant may maintain an action to recover the value of property sold by the officer, which was exempt by

law from execution, on the indemnifying bond which was required by the officer, and which was executed by the plaintiff as provided in sec. 709, Civil Code. *Dixon* v. *Bacon, &c.*, 3 Bush, 534.

64. A trustee is liable for the illegal conversion of personal estate, and responsible for its reasonable value at the time of conversion. *Smith's ex'r* v. *Vertrees, &c.*, 2 Bush, 63.

65. Renewal of a note is not satisfaction of the debt; and, in this case, does not destroy the rights which statute secured to creditors prior to the conveyance. *Lowry* v. *Fisher, &c.*, 2 Bush, 70.

66. If fugitive criminal be arrested by one, and the reward therefor offered by the Governor received by another, an action may be maintained against the latter by the party who made the arrest. *Stephens* v. *Brooks*, 2 Bush, 137.

67. The purchaser of a mare from a wrong-doer who wrongfully took her from her owner, even though the purchase was for a valuable consideration, is liable to the owner for her value. *Chandler* v. *Ferguson*, 2 Bush, 163.

68. On a promise to pay "as soon as able," a judgment and execution is the best test of defendant's ability to pay. If they prove his ability, he ought to pay; and if they fail, he cannot be prejudiced by the judgment. *Cecil* v. *Welch*, 2 Bush, 168.

69. A written obligation to collect the soldier's wages, and to pay $150 in three and six months, given by a captain to assure payment for a horse for use of one of his men in the military service, was binding on the captain. *Thompson's adm'r* v. *Coppage*, 2 Bush, 318.

70. Partner having partnership funds in his hands after the dissolution of the copartnership, and knowing himself to be indebted to his copartner, and refusing to offer or make payment, is liable for interest on the amount thus withheld from other partner. *Taylor* v. *Young's adm'r, &c.*, 2 Bush, 428.

71. Proprietor of wharf privileges on the bank of a river must build wharves, improve the shore, or make preparation for the reception and delivery of goods, or the accommodation of vessels, before he can claim or collect tolls or wharfage. *City of Columbus* v. *Grey*, 2 Bush, 476.

72. If proprietor permits city authorities to improve wharf and collect tolls, he will only be entitled to reasonable compen-

sation for use of the river bank. *City of Columbus* v. *Grey*, 2 Bush, 476.

73. A director of a corporation organized under the act in 2 Revised Statutes, 517, will be liable for debts created by the corporation beyond the capital stock of the company, with his assent, express or implied. *Cornwall & Maize* v. *Eastham*, 2 Bush, 561.

74. A sheriff who negligently fails to arrest one under indictment when he has a warrant commanding such arrest, or, having arrested one under indictment, willfully takes insufficient bail, is liable in a civil action on his bond for damages. *Commonwealth* v. *Reed, &c.*, 2 Bush, 618.

75. M. & B. sold stock of goods to Mc. & M., who agreed in consideration thereof to pay the debts of vendors, and executed a bond to secure the payment. *Held*—that a creditor of M. & B. can sue on the bond, by making necessary allegations and bringing proper parties before the court. *Garvin & Co.* v. *Mobley, &c.*, 1 Bush, 48.

76. The right of a military commander to seize and destroy or appropriate private property never exists, except as the consequence of actual emergency. To justify the exercise of the power on the ground of necessity for subsistence or otherwise, the necessity must be urgent for the public service, and such as will not admit of delay. (Mitchell v. Harmony, 13 Howard, 135.) *Farmer* v. *Lewis, &c.*, 1 Bush, 66.

77. Certain actions are to be commenced within five years after the cause of action accrued. (Sec. 1, art. 3, chap. 71, Gen. Stat., 628.) Such actions are deemed to have been commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction. (Sec. 1, art. 4, chap. 71, Gen. Stat.) *Trabue* v. *Sayre*, 1 Bush, 129.

78. Action lies to recover money paid without consideration or upon a fraudulent consideration. *Woodward* v. *Fels*, 1 Bush, 162.

79. Action for procuring the unlawful arrest and imprisonment of plaintiff may be revived after his death, and prosecuted by his personal representative; and in such a case the defendant is liable for each day the imprisonment was continued, and the statute of limitations does not bar the action as to the injury

sustained within one year next before the action was commenced. *Huggins* v. *Toler*, 1 Bush, 192.

80. An attorney's liability rests upon the principle of his agency for his client, and he is not liable to an action for money collected by him until after a refusal on his part to pay it over. *Roberts* v. *Armstrong's adm'r*, 1 Bush, 263.

81. A citizen with whom a Confederate general left a horse in lieu of one taken from him, acquired a valid title as against the United States. *Cessna* v. *Thurman*, 1 Bush, 292.

82. In an action where the parties are so multitudinous as to have vexatiously prolonged and probably altogether prevented a full hearing, it was proper for the court to make an order permitting a portion of the parties to stand for all. *Hendrix, &c.* v. *Money, &c.*, 1 Bush, 306.

83. Confederate captain held liable for mules seized and converted by him, because he had no authority to take the mules for Confederate use. *Beck* v. *Ingram*, 1 Bush, 355.

84. Money paid through a clear and palpable mistake of law or fact, which in law, honor or conscience, was not due, may be recovered back. *City of Louisville* v. *Henning & Speed*, 1 Bush, 381.

85. Although a railroad is liable for the value of slaves negligently or wantonly transported so that they escape, yet if the slaves return to the master, only the value of their services while absent can be recovered. *Louisville & Nashville R. R. Co.* v. *Young*, 1 Bush, 401.

86. The principle that one judgment in ejectment formed no bar to another for the same land, was attested by the act of the Legislature of 1825. *Troutman, &c.* v. *Vernon, &c.*, 1 *Bush*, 482.

87. An officer who makes an excessive levy of an execution is liable therefor; but he may levy on so much of defendant's property as he may honestly deem necessary to pay the debt and costs; and after levying on stock and taking it into his possession, if he does not take as good care of it as an ordinarily prudent man would take of his own, he is responsible for accruing damages whether such was the result of mere negligence or willfulness. *Vance* v. *Vanarsdale*, 1 Bush, 504.

88. A bond executed by a commissioner and receiver appointed by a circuit court, although not provided for by statute, is

good and valid as a common law bond. *Ellis* v. *Carr, guardian, &c.*, 1 Bush, 527.

89. Persons having voluntarily accepted the benefits of unconstitutional local legislation, must bear their proportion of the burthens imposed by such enactments. *Ferguson, &c.* v. *Landram, &c., and Cloud, &c.* v. *Coleman, &c.*, 1 Bush, 548.

90. Although sec. 111, Civil Code, authorizes plaintiffs to unite, in the same petition, claims for recovery of land and damages for detention thereof—this is a privilege he may or not avail himself of. (18 B. Mon., 544.) He may prosecute one suit to recover the land and another to recover damages for unlawful cutting of timber on the land. A recovery in the first suit of the land and one cent in damages, is no bar to a recovery of damages committed before the first suit was commenced; and evidence is admissible to show that the claim for damages was not litigated in the first suit. *Burr, McGrew & Co.* v. *Woodrow, &c.*, 1 Bush, 602.

91. The city of Covington having a wharf in its corporate limits on the shores of the Ohio and Licking rivers, and keeping it for hire and charging for the landing and anchorage of boats thereto, is liable for the loss of a coal-boat at said wharf, occasioned by the want of reasonable care and skill in providing proper fastenings for boats when lying at said wharf. *Shinkle* v. *City of Covington*, 1 Bush, 617.

92. H. sold to M. a farm in Rowan county for three thousand dollars in Confederate money, whilst said county was within the Confederate military lines and jurisdiction, and executed and delivered his bond for a conveyance thereof. *Held*—that he was legally liable to perform the covenants of the bond. *Martin* v. *Hortin, &c.*, 1 Bush, 629.

II. FOR WHAT AN ACTION WILL NOT LIE.

1. See STATE OF KENTUCKY; TOWNS AND CITIES; and SURVIVOR OF ACTIONS.

2. No action can be maintained against any person for any judicial act within the limits of his jurisdiction, even though it be illegal or erroneous, unless he acts from impure and corrupt motives. (Revill, &c. v. Pettit, 3 Metcalfe, 314.) *Ayars, &c.* v. *Cox*, 10 Bush, 201.

3. The statute of frauds and perjuries does not make a contract void, but only declares that no action can be maintained on it. *Kleeman & Co.* v. *Collins*, 9 Bush, 460.

4. The Commonwealth cannot be sued; but a counter-claim or set-off may be maintained against the State. *Commonwealth* v. *Todd, &c.*, 9 Bush, 708.

5. But a party sued by the Commonwealth cannot recover his costs against it if he is successful, nor can he be burdened with the general costs of the litigation. *Commonwealth* v. *Todd, &c.*, 9 Bush, 708.

6. An action for modification of judgment and enjoining it to correct errors of the circuit court, on grounds which might be available in the Court of Appeals, is not the proper remedy. *McCown* v. *Macklin's ex'r*, 7 Bush, 308.

7. Misprision of the clerk cannot be corrected by an action in equity. *McCown* v. *Macklin's ex'r*, 7 Bush, 308.

8. Distributees cannot sue jointly and recover a joint judgment against the administrator, for an alleged balance of their several shares of the amount found due to them by settlement. *Pelly* v. *Bowyer, &c.*, 7 Bush, 513.

9. No action will lie to recover a sum of money for endeavoring to procure a pardon. *Thoinpson, &c.* v. *Wharton*, 7 Bush, 563.

10. Action cannot be maintained for use and occupation, unless the relation of landlord and tenant has existed between the parties; and not then, except upon an express or implied promise of payment. *Hall & May* v. *Jacobs & Co.*, 7 Bush, 595.

11. Neither party should be allowed to re-litigate the same matter of controversy by a new and independent suit, unless on some of the grounds for a new trial; and where the title and possession of land have been litigated in one suit, the judgment in that suit will be a bar to another action for the recovery of the same property, unless the plaintiff has acquired some new right to the property. *Owens* v. *Rawleigh*, 6 Bush, 656.

12. Where the jury find for defendant, upon an issue of title to the property possession of which has been transferred pending the suit from defendant to plaintiff, the right to a return of the property was involved and implied; and although none was rendered, yet plaintiff in former action cannot maintain suit after-

wards to recover the property or its value. *Owens* v. *Rawleigh*, 6 Bush, 656.

13. If substitute of drafted man stipulates for faithful service, and afterwards deserts, he is not entitled to recover an unpaid balance of amount which was promised him for his becoming a substitute. *Napier* v. *Green*, 3 Bush, 52.

14. Defendant whose land is ordered to be sold under judgment, filed his petition for a new trial, but did not obtain an injunction as per Code, sec. 584. *Held*—that neither plaintiff nor commissioner is liable for sacrifice of land. As neither plaintiff nor commissioner proceeded illegally to execute the judgment, the defendant's only remedy was by proceedings to vacate the judgment and sale. *Brown* v. *Hudson*, 3 Bush, 60.

15. A surety in a constable's bond is not liable thereon for the constable's acts of violence, which are personal wrongs. *Jewell* v. *Mills*, *&c.*, 3 Bush, 62.

16. Railroad company is not liable for value of mule killed by an inevitable collision, there being no negligence, unskillfulness, defective machinery, or recklessness. *Louisville & Nashville R. R. Co.* v. *Wainscott*, 3 Bush, 149.

17. A railroad company is not liable for value of goods captured by Confederate troops in its depot, without culpable negligence upon part of the company or its agents. *Frank*, *&c.* v. *Keith*, *&c.*, 2 Bush, 123.

18. Contract by jailer, to appropriate any part of jail to accommodation of private persons for uses not prescribed or implied by law, is against public policy. (Miller v. Porter, 8 B. Mon., 282.) *Thompson* v. *Probert*, 2 Bush, 144.

19. A note indorsed "This note has been paid to me by Mr. John Rudy, March 3, 1866," is not sufficient to transfer note or lien secured thereby, to Rudy as against third parties. *Bank of Hopkinsville*, *&c.* v. *Rudy*, 2 Bush, 326.

20. A circuit court clerk is not liable for the loss of a debt which resulted from his mistake in omitting to enter judgment, unless it arose from his gross negligence or fraud. *Commonwealth and Wakefield's ex'r*, *&c.* v. *Thompson*, *&c.*, 2 Bush, 559.

21. An undertaking to pay money for supposed or actual influence with the military authorities, to induce them to allow

a person to avail himself of privileges to which he was lawfully entitled, is against public policy and illegal. *Hutchen* v. *Gibson*, 1 Bush, 270.

ADEMPTION.

1. A devise is not adeemed by a subsequent advancement. *Grigsby's ex'r* v. *Wilkinson, &c.*, 9 Bush, 91.

2. Specific bequest to one not testator's heir is adeemed by alienation before testator's death. *Lilly* v. *Curry's ex'r, &c.*, 6 Bush, 590.

3. The common law, that alienation adeems specific bequest, does not apply to bequests to testator's heirs, unless testator so intends. (Sec. 1, art. 3, chap. 50, Gen. Statutes, 512.) *Lilly* v. *Curry's ex'r, &c.*, 6 Bush, 590.

4. The sale of the horse by Curry before his death was an ademption of the legacy, the bequest not being to one of his heirs. Curry bequeathed the horse to Cogswell, a citizen of Missouri. Lilly sold the horse before Curry's death for $200. Anderson, a creditor of Cogswell, after Curry's death attached and recovered judgment against Lilly for price of the horse. Lilly did not cause Curry's executor to be made a party, and interplead with Anderson. Curry's executor afterwards sued Lilly, and recovered judgment for the price of the horse. The judgment in the attachment suit was no bar to the suit by the executor. *Lilly* v. *Curry's ex'r, &c.*, 6 Bush, 590.

ADMINISTRATORS.

1. See EXECUTORS AND ADMINISTRATORS.

2. Administrator *de bonis non* appealed to equity against the heirs and administrator of the first administrator of his intestate, and against the heirs of his intestate, for possession of uncollected notes belonging to the estate of his intestate. More than five years having elapsed since intestate's death, and the notes not being necessary to pay debts—to save distributees from unnecessary commissions, court did right to decree distribution, and dismiss petition of administrator *de bonis non*. *Bellomy's adm'r* v. *Bellomy, &c.*, 3 Bush, 109.

ADMISSIONS.

See EVIDENCE.

AD QUOD DAMNUM.

1. The Jefferson Court of Common Pleas has jurisdiction under sec. 2 of "An act to incorporate the Louisville Bridge Co." (Session Acts, 1855–'6, p. 426), of a proceeding to condemn by writ of *ad quod damnum* as much real estate as may be necessary for the site of said bridge, or the sites for the piers, abutments, toll-houses, and avenues leading thereto. *Reed, &c.* v. *Louisville Bridge Co.*, 8 Bush, 69.

2. The Company under said act had the right to condemn as much land as was necessary, and acquire title thereto; and the necessity must be ascertained by a competent tribunal. The jury should hear no evidence except upon the value of the land, and the court should hear the evidence upon the question of necessity, and then award the writ for the jury to assess the value of the land. *Reed, &c.* v. *Louisville Bridge Co.*, 8 Bush, 69.

3. Under the provisions of the act of March 9, 1868, the city of Louisville, if dissatisfied with the amount assessed as the value of the property sought to be taken, must dismiss its petition before final judgment or order upon the inquest or traverse. *Duncan, trustee, &c.* v. *Mayor of Louisville*, 8 Bush, 98.

4. The amount of compensation to the owner must be ascertained as follows:

First. By ascertaining the value of the entire tract of land, excluding the enhancement resulting from the contemplated improvement; then, what will be its value after the appropriation of the portion or such estate therein as may be taken. The difference in value thus found, is the true compensation to which the owner is entitled for the land proposed to be taken.

While every circumstance injuriously affecting the citizen in the enjoyment of the land not taken, which can be satisfactorily demonstrated to grow out of his being deprived of the use theretofore enjoyed by him of the portion taken, should receive

due consideration, reasons which are merely personal to the owner should be disregarded; and also such prospective damages as may follow the construction and operation of the road.

Second. In determining the consequential damages, a survey should be taken of all the advantages and disadvantages which may be reasonably anticipated to result from the prudent construction and operation of the road; and if the balance be against the owner of the land, then, to the extent that such balance diminishes its market value, he should have a judgment on account of incidental damages. Otherwise, nothing. *Elizabethtown & Paducah R. R. Co.* v. *Helm's heirs*, 8 Bush, 681.

5. Opinions of witnesses, based upon knowledge of results arising from construction and operation of other railways, not competent, unless witnesses are acquainted with the peculiar facts and circumstances of the case under trial. *Elizabethtown & Paducah R. R. Co.* v. *Helm's heirs*, 8 Bush, 681.

6. For land sold before condemnation, vendor not entitled to damages. *Same*, 681.

7. That the provisions of a charter have been strictly pursued, can only be shown by the record itself if it be in existence. *Penny, &c.* v. *Pindell, &c.*, 7 Bush, 571.

8. All proceedings may be presumed to have been in conformity with the charter, to sustain judgments of courts of competent jurisdiction not under review; but, coming into a suit collaterally in support of a link in the chain of title, in cases where parts of the records or files have been lost, their loss or destruction should be made clearly to appear, before admitting parol or secondary evidence of what the record contained. *Penny, &c.* v. *Pindell, &c.*, 7 Bush, 571.

9. A shanty, put up and occupied for the sole purpose of preventing the condemnation of a stone-quarry, and not in good faith for a dwelling-house, will not entitle the owner to the exemption of quarries within two hundred yards of a dwelling-house, as provided in chapter 103 of the Revised Statutes. (2 Stanton, 436.) *Morris* v. *The S. Branch of Winchester & Red River T. P. Co.*, 4 Bush, 448. (Sec. 22, chap. 110, Gen. Stat., page 826.)

ADVANCEMENTS.

1. Advancements shall be estimated at their value when made. An advancement secured by deed, but to be enjoyed at a future period, shall be charged as of the date when it is made complete by the actual possession and enjoyment of that which is advanced. (Hook v. Hook, 17 B. Monroe, 528.) *Stevenson, &c.* v. *Martin, &c.*, 11 Bush (Oct. 23, 1875).

2. The intention of the donor to make an advance to his daughter will be presumed, from the fact that he conveys to her husband upon the sole consideration of the marriage relation between them. (Barber v. Taylor's heirs, 9 Dana, 84; Clarkson v. Clarkson, 8 Bush, 655; Clarke v. Clarke, 17 B. Monroe, 708.) *Stevenson, &c.* v. *Martin, &c.*, 11 Bush (Oct. 23, 1875).

3. Gifts made to grandchildren during the life of their parents, ought *not* to be treated and held to be advancements to the parents of such grandchildren. (Rev. Stat., chap. 30, sec. 17.) *Stevenson, &c.* v. *Martin, &c.*, 11 Bush (Oct. 23, 1875).

4. A parent or grand-parent cannot, by a mere declaration of intention, declare an advancement to be such, which is not such by law, or exempt a child from liability, whom the statute charges; but only by a will disposing of his entire estate. (Clarke v. Clarke, 17 B. Monroe, 707; Cleaver vs. Kirk's heirs, 3 Metcalfe, 270.) *Shawhan* v. *Shawhan's adm'r*, 10 Bush, 600.

5. An intestate had kept an account of advancements to his children, charging some with rents for land occupied by them; but against one there was no charge. *Held*—that in the distribution he also should be charged with rents as an advancement. *Shawhan* v. *Shawhan's adm'r*, 10 Bush, 600.

6. Testator made his will in 1847, in which he charged his son with an advancement of $1,800. In 1853, testator sold to his son, and received from him the price of, a slave which was in possession of the son when the will was made. Testator owned a life-estate only in said slave. The remainder-men ratified the sale, and claimed against the testator's estate the price for which the slave was sold. The son claimed that the slave was estimated in the advancement charged against him in the will, and that he ought not to be charged with any part of the

price claimed against the estate by the remainder-men. *Held*—that the son cannot be allowed to question the right of the testator to charge him with the advancement, nor to show that by reason of subsequent transactions the will ought in justice to have been changed, nor to escape the payment to the owners of the remainder in the slave his proportion of the amount for which the testator sold their property. *Grigsby's ex'rs* v. *Wilkinson, &c.*, 9 Bush, 91.

7. A devise of one-fifth of the residue of testator's estate, after satisfying provision for his wife and paying debts and funeral expenses, is not adeemed or satisfied by a subsequent advancement to the devisee, made by the testator during his lifetime. *Grigsby's ex'rs* v. *Wilkinson, &c.*, 9 Bush, 91.

8. In ascertaining the advancements made to the various heirs, as provided for in sec. 17, chap. 30, Rev. Stat. (1 Stanton, 426; now sec. 15, chap. 31, Gen. Stat., page 374), the court is not precluded by the will from inquiring whether or not, as matter of law, the amounts received by the heirs respectively are properly charged to them as such. *Clarkson, &c.* v. *Clarkson, &c.*, 8 Bush, 655.

9. A son gave a receipt for $2,000, and accepted it in full for his portion of his father's estate, and bound himself never to set up any claim against his father or his estate. *Held*—that the son having received his "full proportion," was not entitled to anything further from his father's estate. (Rev. Stat., chap. 30, sec. 17.) *Cushing* v. *Cushing, &c.*, 7 Bush, 259.

10. Testator devised land to two sons, and required them to pay $4,000. It appeared that he considered the land worth much more than that amount, which, being undisposed of, passed by descent to his heirs. The excess of the value of the land was charged to the two sons as an advancement, and they could receive no part of the $4,000 until the other descendants were made proportionately equal. *Renaker* v. *Lafferty's adm'r*, 5 Bush, 88.

11. Testator, by his will in 1855, devised the whole of his estate to his wife during her life, and at her death to be equally divided amongst his six children and their heirs, except to one son $300 more, and to one daughter $300 less than one-sixth, subject to this condition: "Should they or either of them die

without lawful issue, then the portions of my estate given to them and each of them are to belong to my other children and heirs-at-law, according to the laws of descent and distribution now in force." The said son died without issue, before the widow. His portion passed under the will as undevised estate, and the daughter who was to receive $300 less than one-sixth should be made equal with the other heirs before they should receive anything from the son's portion. *Cole and wife* v. *Palmer's ex'r, &c.*, 1 Bush, 371.

ADVERSE POSSESSION.

See POSSESSION.

AFFIDAVIT.

1. The plaintiff who requires parties to interplead should make affidavit that there is no collusion between him and the other parties. *Starling* v. *Brown, assignee, &c.*, 7 Bush, 164

2. Provision of Civil Code, prohibiting bringing ordinary actions against personal representatives without making affidavit and demand, is imperative. (Civil Code, sec. 473.) A judgment must be verified and demand made, before proceeding to enforce it. *Curry's adm'r* v. *Bryant's adm'r*, 7 Bush, 301.

3. Affidavit prescribed in Civil Code, sec. 439, may be made in the petition or amended petition, stating that any of the allegations thereof are true and known to be so by defendant, and cannot be proved or shown otherwise than by his answer, so far as affiant believes. Such allegations, unless denied by the answer, shall be taken as true. *Tipton* v. *Wright*, 7 Bush, 448.

4. A clerk of a court is authorized to administer oaths, and certify the affidavits of claimants to demands against decedents' estates. (Civil Code, sec. 611.) *Laha* v. *Daly's adm'r*, 1 Bush, 221.

AGENT.

1. A person serving in the army of one belligerent cannot have an agent within the territory of the other belligerent, to

transact ordinary business. But he may have an agent there for some purposes. (Ward v. Smith, 7 Wallace, 452; Montgomery v. United States, 15 Wallace, 395.) *Buford* v. *Speed*, 11 Bush (Sept. 28, 1875).

2. A third person dealing with an agent must look to his power, and judge for himself of its extent. *Reed, &c.* v. *Welch, &c.*, 11 Bush (Oct. 22, 1875).

3. Those who undertake to run cars upon the streets of a populous city are bound to take ordinary care to avoid injuring persons on the streets. If one person cannot perform the duties of both driver and conductor, so as not to endanger the safety of others, they should employ more hands. *Louisville City Railway Co.* v. *Brotzge, &c.*, 11 Bush (Nov. 8, 1875).

4. An auctioneer is the agent of both the seller and purchaser. *Gill* v. *Hewitt*, 7 Bush, 10.

5. Agent employed by different owners to sell two parcels of real estate, and who brought about an interview between the owners, who made an exchange, is entitled to customary compensation from each party. The proof showed that the local custom entitled the agent to commissions from both parties. *Mullen* v. *Keetzleb & Lampton*, 7 Bush, 253. (See Lloyd v. Colston & Moore, 5 Bush, 587.)

6. Agent who deposits money of his principal in bank in his own name, without collusion of principal: in controversy between principal and attaching creditor of agent, the principal is entitled to recover the fund. *Skilman, &c.* v. *Miller, &c.*, 7 Bush, 428.

7. Deposit of consignor's funds in bank by factor, in his own name, makes factor liable in case of the failure of the bank. (Story's Equity, sec. 1270; Story on Agency, sec. 208.) *Cartmell & Drury* v. *Allard*, 7 Bush, 482.

8. Confessions of an agent after his discharge from the service of a company are not evidence against the sureties of the agent, in an action on his bond. *Pollard* v. *Lou., Cin. and Lex. R. R. Co.*, 7 Bush, 597.

9. An agent to sell cannot become an agent to buy, in the same transaction. (Story on Agency, sec. 211.) *Lloyd* v. *Colston & Moore*, 5 Bush, 587.

10. Real estate agents for one party, in the sale or exchange of property, cannot represent the other party in the same transaction, and cannot demand and recover commissions for both parties. *Lloyd* v. *Colston & Moore*, 5 Bush, 587.

ALIEN ENEMIES.

1. See WAR.

2. Alien enemies may sustain the relation of debtor and creditor. If the debt existed prior to the war, the right of action is suspended during hostilities, and revives with peace, unless the sovereign has intervened by confiscation. During the war, the relation may be created by consent of the sovereign, and may be created by necessity without license. *Crutcher* v. *Hord and wife*, 4 Bush, 360.

3. An alien enemy may be the devisee of real estate, or distributee or legatee of personal estate; and if the government takes no proceedings to confiscate or sequester the property, it will be no defense to his claim after peace is made. (7 Cranch, 626; 1 Johnson's Ch'y Rep., 206.) *Crutcher* v. *Hord and wife*, 4 Bush, 360.

4. The creditor being a citizen of Kentucky, and the land situated therein, the rights of the creditor are protected against the government, on a proceeding to confiscate. (2 Brightly's Digest, 1238.) *Crutcher* v. *Hord and wife*, 4 Bush, 360.

5. Any person not under legal disabilities had the right to purchase the real estate, situated in Kentucky, of debtors residing in the Confederate States, at decretal sales thereof during the war, either for his own or the debtor's benefit; and legal rights and responsibilities might spring out of the conduct of the purchaser, which would remain suspended during hostilities. On the restoration of peace, the debtor's right of action would revive, and he could enforce any legal right which existed prior to or was created during the war. *Crutcher* v. *Hord and wife*, 4 Bush, 360.

ALIMONY.

See DIVORCE.

ALLEGATION AND PROOF, IN CIVIL CASES.

1. Failure to establish an immaterial averment does not militate against the right of the plaintiff to recover. *Louisville and Nashville R. R. Co.* v. *Goodnight, &c.*, 10 Bush, 552.

2. To establish heirship, the facts should be alleged and proved, if not admitted; and to aver that a person is "heir" to another is not sufficient. (Banks v. Johnson, 4 J. J. Mar., 649; Currie v. Fowler, 5 J. J. Mar., 145.) *Larue* v. *Hays, &c.*, 7 Bush, 50.

3. The law traverses every material allegation in an answer to which a reply is not required by the Civil Code. *Robinson* v. *Williamson*, 7 Bush, 604.

4. The plaintiff can recover only upon the proof of the cause as alleged in the pleading. (Kearney v. City of Covington, 1 Met., 339.) *Gossom* v. *Badgett*, 6 Bush, 97. But either party may amend at any time, when the amendment does not change substantially the claim or defense, by conforming the pleading to the facts proved. Sec. 161, *Civil Code.*

5. Allegation of a joint undertaking is not supported by evidence of a separate agreement, and is a failure of proof. *Gossom* v. *Badgett*, 6 Bush, 97.

6. The court should determine, not only what allegations are material, but also whether they have been specifically controverted; and instruct the jury what facts are to be considered as true under the pleadings in the action. (Tipton v. Triplett, 1 Met., 570.) *Yeiser & Wells* v. *Brown*, 6 Bush, 190.

ALTERATION OF WRITINGS.

1. The surety upon a note is released, if, after the surety has signed, the principal adds to the note the words, "Said note to bear legal interest." And being thus discharged, his liability could not be restored by the erasure of the words thus wrongfully added. The surety never undertook to pay the note in its altered form; and after his discharge he could have been no more bound by the acts of others without his authority and consent, than he would have been bound to pay the note if he had

never executed it. *Locknane* v. *Emmerson*, 11 Bush (March 30, 1875).

2. Where the holder of a bill of exchange alters the general acceptance, the instrument is rendered void; but action lies against those consenting to the alteration. (Burchfield v. Moore, 3 Ellis & Bl., 683; 25 Eng. Law and Eq. Rep., 123; Oakey v. Wilcox, 3 How. Miss., 330; 2 Parsons on Notes and Bills, 548.) *Whitesides* v. *Northern Bank of Kentucky*, 10 Bush, 501.

3. The answer of an indorser in an action on the bill, setting up an alteration, need not aver that neither he nor the acceptor ratified the alteration before the bill became due; and on demurrer to the answer, no inference unfavorable to the indorser can be drawn from the fact that the acceptor is making no defense to the action. *Whitesides* v. *Northern Bank of Kentucky*, 10 Bush, 501.

4. Alteration of a bill of exchange in a material part, without consent, renders it invalid, in the hands of an innocent holder, as well as one who takes it knowing the fraud. (Chitty on Bills, 100; 2 Parsons on Bills, 580.) *Woolfolk* v. *Bank of America*, 10 Bush, 504.

5. An alteration of a note or mutilation affecting the legal or equitable rights of the parties, caused by the holder, and which was intentional on his part, invalidates it. If the alteration or mutilation is material, the *onus* is on the holder to explain it. If the alteration or mutilation is against the interest of the holder, is a circumstance to be considered by the jury whether it had been made or not. When the fact, however, is shown, the explanation as to when and how it was done lies with the holder. (2 Parsons on Notes and Bills, 579.) *Elbert* v. *McClelland, &c.*, 8 Bush, 577.

6. In the above case, the name of one of the obligors was torn off, when delivered to obligee. He ought not to have received the paper without having evidence of the cause of its mutilation. *Elbert* v. *McClelland, &c.*, 8 Bush, 577.

7. Every material alteration of a note made after delivery, without consent of payor, renders it void. But the holder has a right to correct a mistake in it, to make it conform to what all

the parties agreed or intended it should be. (Parsons on Bills and Notes, 569, &c.) *Duker* v. *Franz*, 7 Bush, 273.

8. In above case, the note was dated in 1868. It should have been 1869, and it was changed by writing 9 over 8. *Held*—that it did not vitiate the note. *Duker* v. *Franz*, 7 Bush, 273.

APPEALS.

1. See CRIMINAL LAW AND PROCEEDINGS.

2. The court of appeals will not interfere, when the proper tribunal has acted in the matter of granting license to sell liquors, unless there has been abuse of discretion or disregard of expediency. *Pierce* v. *Commonwealth*, 10 Bush, 6.

3. The jurisdiction of the court of appeals in misdemeanors is limited by the act of March 1, 1860, to cases where the fine exceeds fifty dollars or imprisonment for thirty days, or both. *Baer* v. *Commonwealth*, 10 Bush, 8.

4. Defect of parties plaintiff is a fact which cannot be raised for the first time in the court of appeals. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

5. Replevying or satisfying a judgment, is no waiver of the right to appeal. *Kellar* v. *Williams*, 10 Bush, 216.

6. Where a verdict is set aside and petition dismissed, for not showing cause of action; the sufficiency of the petition may be considered on appeal, though no bill of evidence accompanies the record. *Johnson's adm'r* v. *Louisville City Railway Co.*, 10 Bush, 231.

7. Appeals from justices' and quarterly courts, must be taken in the manner prescribed in the Code. *Davis* v. *Davis*, 10 Bush, 274.

8. A case appealed from justices' court cannot be transferred by agreement to the circuit court, without trial in quarterly court. *Davis* v. *Davis*, 10 Bush, 274.

9. Verdict of a jury in a will case will be treated on appeal as verdicts in other cases. *Broaddus' devisees* v. *Broaddus' heirs*, 10 Bush, 299.

10. A new trial will be awarded on the reversal of a will case by the court of appeals, except when there is no evidence to

sustain the verdict, when it will be ordered to be probated or rejected without further proceedings. *Broaddus' devisees* v. *Broaddus' heirs*, 10 Bush, 299.

11. The circuit court cannot "reverse" a judgment appealed from, but may give judgment on the merits, or dismiss the action, or dismiss the appeal. *Bennett* v. *Thompson*, 10 Bush, 365.

12. An order confirming a report of sale is final, and may be appealed from by the party aggrieved. *Dawson, &c*, v. *Litsey*, 10 Bush, 408.

13. Appeal without motion for new trial, brings only the pleadings, verdict, and judgment before the court of appeals; if they authorize the judgment rendered, it will be affirmed. *Harper* v. *Harper*, 10 Bush, 447.

14. On a motion for a new trial, the court should review its rulings excepted to, and, if error has been committed, grant a new trial; if the court refuses, on appeal the case will be remanded for a new trial. *Harper* v. *Harper*, 10 Bush, 447.

15. The time for filing a bill of exceptions is reckoned from the overruling of the motion for new trial; the court cannot prescribe the time. *Harper* v. *Harper*, 10 Bush, 447.

16. An escaped prisoner convicted of a felony will not be permitted to prosecute an appeal to reverse the judgment of conviction. *Wilson* v. *Commonwealth*, 10 Bush, 526.

17. Appeal prosecuted directly from justices' court to circuit court was properly dismissed. *Hind* v. *Rice*, 10 Bush, 528.

18. Order of justices' or quarterly courts sustaining an attachment may be appealed from, without appealing from the personal judgment for the debt. Execution may issue, but the sale of the attached property will be stayed till judgment on the appeal. *Hawkins* v. *Baldauf & Bro.*, 10 Bush, 624.

19. The court of appeals has jurisdiction of an appeal from an order of the Jefferson county court, directing the collection of a tax assessed under the provisions of the act of February 11, 1873, to incorporate a police municipality in Jefferson county. *Bate, &c.*, v. *Speed, &c.*, 10 Bush, 644.

20. An order compelling a plaintiff to elect which of two causes of action he will prosecute, is not a final order from which appeal lies; but it may be revised on an appeal from the

final judgment, and his election to strike out one cause under protest is no waiver of the error. *Jones, assignee, &c.*, v. *Johnson, &c.*, 10 Bush, 649.

21. Appeals in misdemeanor cases cannot be prosecuted by the attorney-general. Sec. 331, Criminal Code, provides for appeals in cases of felony only. *Commonwealth* v. *Dobbins*, 9 Bush, 1.

22. An appeal will lie from an order granting a new trial, upon petition, under section 579 of the Civil Code. *McCall* v. *Hitchcock*, 9 Bush, 66.

23. After getting a new trial, defendant cannot prosecute an appeal from the original judgment. *McCall* v. *Hitchcock*, 9 Bush, 66.

24. When the mandate of the court of appeals orders the entering of a certain judgment, it is not error to refuse permission to the defendants to file an amended answer, setting up facts sufficient to authorize the vacating of the judgment, if rendered. The judgment ordered by the mandate should be entered; the grounds for vacating it may be set up by petition (Civil Code, sec. 579); and a new trial may be granted as prescribed in the Code (sec. 373). *Scott, &c.* v. *Scott's ex'r*, 9 Bush, 174.

25. A judgment of conviction in a criminal case will be reversed for an error not specified in the grounds for new trial. *Johnson* v. *Commonwealth*, 9 Bush, 224.

26. A judgment of conviction cannot be reversed because the verdict is not sustained by the evidence. *Johnson* v. *Commonwealth*, 9 Bush, 224.

27. Plaintiff's action was erroneously dismissed on the merits, when no guardian *ad litem* had been appointed to defend for infant defendants; the court of appeals will reverse such judgment, etc., remand the case, etc., with instructions to appoint a guardian *ad litem*. But on second hearing, the court below will be bound by the opinion of the court of appeals only to the extent that it may apply after defense by guardian. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

28. The statute authorizing the court of appeals to order a will to be admitted to probate against the finding of a jury, is not in conflict with the "bill of rights;" nor does it violate the

ancient mode of trial by jury. *Wills, &c.* v. *Lochnane and wife*, 9 Bush, 547.

29. An order sustaining a demurrer to jurisdiction and awarding judgment for costs is a final order. *Dudley* v. *Kentucky High School*, 9 Bush, 576.

30. When no appeal is granted by the inferior court, the appeal is taken by application to the clerk of the court of appeals, by filing the record with him, with the names of the parties appellant and appellees; and as matter of right he must grant the appeal. The appeal dates from the filing the record with the clerk of the court of appeals. Suing out a summons is not necessary to secure an appeal. *Jones' ex'x, &c.* v. *Finnell & Winston*, 8 Bush, 25.

31. An appeal may be prosecuted for infants by the guardian *ad litem* in their names, although the statutory guardian has receipted for damages arising from condemnation of land under writ of *ad quod damnum*. *Reed, &c.* v. *Louisville Bridge Co.*, 8 Bush, 69.

32. No appeal can be prosecuted until the motion for a new trial in the court below is disposed of. *Louisville Chemical Works* v. *Commonwealth*, 8 Bush, 179.

33. Sec. 343, Civil Code, refers to the term at which the motion for a new trial is overruled, when the appeal should be prayed. *Louisville Chemical Works* v. *Commonwealth*, 8 Bush, 179.

34. Clerk failing to index copy of record is not entitled to fee for making out transcript. *Tracy & Loyd* v. *Hornbuckle, &c.*, 8 Bush, 336.

35. Service of a summons on party who prosecutes an appeal is dispensed with upon return of the case to the circuit court. *Cavin & Elliott* v. *Williams & Ray*, 8 Bush, 343.

36. Failure of the circuit court to pass upon exceptions to depositions, because they were irrelevant and incompetent, is no cause of reversal. (Civil Code, sec. 161.) *Roots* v. *Merriwether*, 8 Bush, 397.

37. Petition failing to state facts constituting a cause of action, unless cured by the answer, judgment thereon will be unauthorized, and will be reversed. *Maddox, &c.* v. *Fox, &c.*, 8 Bush, 402.

38. County attorney has the right to prosecute an appeal to the circuit court from a judgment of the county court altering a public road. *Commonwealth* v. *Kimberlin*, 8 Bush, 444.

39. When the right of appeal depends on the amount of the recovery in money or personal property, costs cannot be included in estimating the value necessary to give jurisdiction to the court of appeals. *Moore, &c.* v. *Boner, &c.*, 7 Bush, 26.

40. When the title to land is put in issue, either party may appeal, although the judgment appealed from is alone for costs. (Caskey v. Lewis, 15 B. Mon., 27.) *Moore, &c.* v. *Boner, &c.*, 7 Bush, 26.

41. Party executing an appeal bond by mistake to suspend a personal judgment, was permitted to execute another superseding the judgment sustaining the attachment. The personal judgment was affirmed without damages, and the residue of the judgment was reversed. *Ross, &c.* v. *Wilson, Peter & Co.*, 7 Bush, 29.

42. Court of appeals will reverse void judgment. *Landrum* v. *Farmer*, 7 Bush, 46.

43. Appeal from city court of Lexington does not lie to the court of appeals from a judgment dismissing a warrant against a peddler for vending goods, &c., without license. *Commonwealth* v. *Ingraham*, 7 Bush, 106. But when the judge of said city court decides against the validity of any ordinance or by-law of said city, an appeal lies directly to the court of appeals. *Same.*

44. When a judgment is reversed for error in admitting incompetent evidence, it is proper for the court of appeals to point out errors in instructions, although they were not objected to when offered. *Edgerton* v. *Commonwealth*, 7 Bush, 142.

45. Imperfect and defective appeal bond may be perfected, *nunc pro tunc*. *Hargis* v. *Pearce & Son*, 7 Bush, 234.

46. An error which was not made a ground for a new trial in the court below, is not available in the court of appeals. (Slater v. Sherman, 5 Bush, 206.) *Louisville, Cincinnati & Lexington R. R. Co.* v. *Mahony's adm'x*, 7 Bush, 235.

47. Judgments of the court of appeals are void in cases where no appeal was granted by the court below, and there is no ap-

pearance by appellee, and no actual or constructive service on him. *Finnell, &c.* v. *Jones' ex'x*, 7 Bush, 359.

48. Ten per cent. damages will be awarded by the court of appeals, when it appears that an appeal was granted by the court below, and a *supersedeas* bond was executed within the time prescribed by law. *Whitehead* v. *Boorom*, 7 Bush, 399.

49. To supersede the judgment a *supersedeas* must issue, and it is not necessary to make a record that it was issued. When no evidence of its non-issual appears in the record, the court will presume that appellee had been notified of the *supersedeas*. *Whitehead* v. *Boorom*, 7 Bush, 399.

50. Until court below takes action by either disposing or refusing to dispose of property embraced in assignments of parties to the suit, court of appeals has no power to take cognizance of the matter. *Young, McDowell & Co.* v. *Bennett, &c.*, 7 Bush, 474.

51. When executor is removed by county court for failing to give security when required thereto, he must appeal first to the circuit court; and the order of the county court is not final until enforced. *Atwell's ex'r* v. *Helm*, 7 Bush, 504.

52. Where matter in controversy does not exceed $50, on appeal from justice of the peace to the circuit court, the pleadings may be oral. *Wilson* v. *Commonwealth for use of Klette*, 7 Bush, 536.

53. A judgment vacating and setting aside a former judgment, under sections 579 and 581 of the Civil Code, is final, and subject to appeal and revision in the court of appeals. *McCall* v. *Hitchcock*, 7 Bush, 615.

54. An appeal may be prosecuted to the court of appeals, from a judgment of the circuit court, reversing the judgment of the county court dismissing an application for a new road. *Helm, &c.* v. *Short, &c.*, 7 Bush, 623.

55. A final order or judgment either terminates the action, decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original position. (Maysville and Lexington R. R. Co. v. Punnett, &c., 15 B. Mon., 48; Turner v.

Browder, 18 B. Mon., 826.) *Helm, &c.* v. *Short, &c.*, 7 Bush, 623.

56. Regularly, a personal representative should be appointed, and an appeal prosecuted in his name. But when the appeal is prosecuted in the name of the dead plaintiff, without objection by appellee, the judgment of the court of appeals, and proceedings had under it, are not void. The death of appellant should have been taken advantage of in the court of appeals under sec. 898, Civil Code. Death of plaintiff pending suit may be pleaded in abatement, but defendant may waive such plea and permit the case to be tried on its merits without revivor. *Spalding, adm'r, &c.* v. *Wathen*, 7 Bush, 659.

57. As the death of appellant was not known to appellee prior to the reversal, the only means appellee had to correct it was by application to the court of appeals to correct it. Death of one of the parties before judgment is ground for vacating it. (Civil Code, sec. 579.) *Spalding, adm'r, &c.* v. *Wathen*, 7 Bush, 659.

58. An appeal in bastardy cases directly from the county court to the court of appeals by the Commonwealth, is not authorized by sec. 12 of act of June 3, 1865. (Myers' Supplement, 62.) The father alone, under that section, can appeal to the court of appeals. An appeal in such cases lies from the county court to the circuit court, except that the father may appeal directly to the court of appeals. *Commonwealth for Scott* v. *Kendall, &c.*, 6 Bush, 94.

59. An error in overruling a demurrer to an indictment for permitting gaming is not an error for which the judgment can be reversed. (Criminal Code, sec. 349; Marston vs. Commonwealth, 18 B. Mon., 485.) *McDaniel* v. *Commonwealth*, 6 Bush, 326; and *Mork* v. *same*, 6 Bush, 397.

60. The sufficiency of evidence to prove the charge contained in the indictment for a misdemeanor cannot be inquired into on appeal, except to determine the correctness of giving or refusing instructions. The instructions being not copied into the record (being lost), must be presumed to be right. *McDaniel* v. *Commonwealth*, 6 Bush, 326.

61. When the court of appeals has passed upon a record, and then upon a petition for a rehearing, if one has been presented,

and the term has adjourned, the cause is wholly beyond its reach. Bills of review are appropriate in the courts of original jurisdiction, where the original decree was rendered, and in no other. *Beazley* v. *Mershon*, 6 Bush, 424.

62. Judgment against a defendant on an invalid bail bond is an error appearing on the face of the record, and will be reversed by the court of appeals. *Pauer* v. *Simon*, 6 Bush, 514.

63. Bill of exceptions filed at a subsequent term, when no order of court appears extending the time for filing the same to said term, cannot be regarded by the court of appeals. (Vandever v. Griffith, 2 Met., 425.) *Lynch* v. *Reynolds*, 6 Bush, 547.

64. When a reversal of the order granting a rehearing takes place, the original judgment should be restored and affirmed. *Phillips* v. *Skinner*, 6 Bush, 662.

65. All the errors and irregularities appearing in the original record, and which could have been corrected by the first appeal, must, on the second appeal, be regarded as settled and adjudicated, and can afford neither a cause for a review, nor for a rehearing in the court below, nor for correction on the second appeal in the court of appeals. *Mason, &c.* v. *Mason, &c.*, 5 Bush, 187.

66. The court of appeals judicially knows that treasury notes were not equivalent to money. *Perrit* v. *Crouch and the Commonwealth*, 5 Bush, 199.

67. Errors not specified in the grounds on which a new trial was asked in the court below, must be treated by the court of appeals as having been waived. (Civil Code, sec. 372; Hopkins v. Commonwealth, 3 Bush, 480.) *Slater* v. *Sherman*, 5 Bush, 206.

68. Judgment of circuit court arresting judgment and dismissing indictment for robbery, being reversed by the court of appeals, a new trial must be awarded by the circuit court. *Commonwealth* v. *Tanner*, 5 Bush, 316.

69. An appeal may be taken within five years to the circuit court from any order of the county court admitting the will to record or rejecting it; and from the circuit court to the court of appeals within one year after the final decision of the circuit court. Then, any person interested, who, at the time of the final decision in the circuit court, resided out of this State, and

any other person who was not a party to the proceeding, may, within three years after such final decision of the circuit court, by bill in chancery, impeach the decision and have a re-trial of the question of probate; and an infant not a party shall not be barred of such proceeding in chancery until one year after attaining full age. (Civil Code, sec. 519, subsecs. 2, 12; Gen. Stat., chap. 113, sec. 37.) *Cleveland's adm'r* v. *Lyne, &c.*, 5 Bush, 383.

70. Testator's infant child and devisee having survived more than five years after his will was admitted to record, and then having died in infancy, the right of the heirs of such infant to prosecute an appeal to the circuit court from the order of the county court admitting the will to record, is limited to one year after the death of such infant. (Civil Code, secs. 22, 884, 519.) *Cleveland's adm'r* v. *Lyne, &c.*, 5 Bush, 383.

71. Where issues of fact have been formed by the pleadings, both parties heard, a verdict, judgment, and motion for new trial overruled by court below, the court of appeals will not disturb the verdict, unless it is clearly and palpably against the weight of evidence; and where there have been two concurring verdicts, and no misdirection of the jury, the court of appeals will rarely, if ever, disturb the last finding, contrary to the opinion of the court below sustaining it. *Sandford, &c.* v. *Smith, &c.*, 5 Bush, 471.

72. Ten per cent. damages will not be awarded on an affirmance of judgment unless a *supersedeas* has issued. And a judgment is not superseded by the execution of an appeal bond. (Civil Code, secs. 886, 887, 888, 892.) *Reed* v. *Lander*, 5 Bush, 598.

73. On rule, judgment of the court of appeals for ten per cent. damages set aside, because no *supersedeas* was issued. *Reed* v. *Lander*, 5 Bush, 598.

74. Motion for a new trial in the circuit court is essential in an action wherein the issue presented by the pleadings was submitted to a jury, before an appeal can be prosecuted. *Detherage* v. *Montgomery*, 4 Bush, 46.

75. Where the law and fact have been submitted to the court for trial, in an ordinary action, a motion for a new trial in the lower court is not necessary to give the court of appeals juris-

diction of an appeal taken from the judgment in the case. In such case, the court of appeals will consider the judgment of the judge as it would the verdict of a jury. *Union Ins. Co. of Louisville* v. *Groom*, 4 Bush, 289.

76. Infants and defendants, constructively summoned, are allowed alternate remedies to re-try a case: 1st, by proper proceedings in the court below, and 2d, by appeal to the court of appeals. But they cannot pursue both remedies at the same time. (Salter v. Dunn, 1 Bush, 311.) And any matter which can be heard upon the appeal, if there has been an affirmance, the judgment of affirmance is a bar to a petition filed in the circuit court to vacate or set aside the decree appealed from. *Speak, &c.* v. *Mattingly, &c.*, 4 Bush, 310.

77. No appeal can be entertained to correct a clerical misprision until a motion is made in the court below for that purpose. (Dodd v. Combs, 3 Met., 29.) *Long* v. *Gaines, Berry & Co.*, 4 Bush, 353.

78. "Executed by delivering a true copy to John Long:" on judgment by default, the court of appeals cannot presume there were other John Longs in the county than the defendant. *Long* v. *Gaines, Berry & Co.*, 4 Bush, 353.

79. Appointing a commissioner to ascertain alleged usury in controversy in the suit is not a final judgment, and no appeal will lie from it. *Pryor, assignee, &c.* v. *Smith, &c.*, 4 Bush, 379.

80. Judgment dismissing plaintiff's petition on demurrer is final, and an appeal will lie from it. *Commonwealth for use of Young* v. *Peters, &c.*, 4 Bush, 403.

81. A paper purporting to be a bill of exceptions, not signed or filed in court, cannot be considered by the court of appeals. *Corley's ex'r* v. *Evans and wife*, 4 Bush, 409.

82. Time being allowed to complete bill of exceptions in vacation, the presumption is that it was signed out of court, and, according to the Civil Code, is void. *Corley's ex'r* v. *Evans and wife*, 4 Bush, 409.

83. Interlocutory order dissolving injunction is not revisable by the court of appeals; yet judgment for damages is final, and, when the amount of damages authorize an appeal, the court of appeals has jurisdiction. *Offutt's ex'x* v. *Bradford, &c.*, 4 Bush, 413.

84. Order for rule against surety in a bond to perform the judgment of the court discharging attachment, to show cause why he should not be compelled to perform the judgment of the court in the action, is not a final order, and no appeal can be taken on it. *Inman, &c.* v. *Strattan, &c.*, 4 Bush, 445.

85. The plaintiff may sue on the appeal bond without issuing an execution against the defendant; but when an execution issues against defendant, the lien thereby acquired on his property inures to surety in the appeal bond, by subrogation; and if discharged by plaintiff, will release the surety. *Dills* v. *Cecil*, 4 Bush, 579.

86. Exceptions to depositions not acted on by court below are deemed to have been waived. *Patterson, &c.* v. *Hansel, &c.*, 4 Bush, 654.

87. If a party desiring to appeal to the circuit court executes a defective bond before the clerk, he should be allowed to execute a new bond without prejudice to his rights. (Adams v. Settles, 2 Duvall, 77; Civil Code, sec. 753.) *Manier* v. *Lindsey*, 3 Bush, 94.

88. Dismissing appeal by the circuit court remits plaintiff to his original judgment. *Manier* v. *Lindsey*, 3 Bush, 94.

89. It is a fatal blunder, in preparing a case for the court of appeals, to fail to exhibit in the record the needful facts. *Peak, &c.* v. *Hayden, &c.*, 3 Bush, 125.

90. Unless appellant prosecutes his appeal successfully, the result is an affirmance, which in civil cases renders him liable to ten per cent. damages on the amount of the superseded judgment. (Sec. 904, Civil Code.) In penal cases, he renders himself liable to ten per cent. damages on the amount of the suspended fine. (Sec. 352, Crim. Code.) *Evans* v. *Commonwealth*, 3 Bush, 161.

91. Appeals may now be taken from county to circuit courts, and thence to the court of appeals, from any allowance or appropriation, or refusal to make allowance or appropriation. Act March 7, 1867.

92. Failure to make a motion to dismiss appeal, because the record was not filed within the time prescribed by law, until after the case was submitted on final hearing, must be regarded

as a waiver of the right. *Bixler's adm'x* v. *Parker, &c.*, 3 Bush, 166.

93. Courts of this State are required to take notice of private acts of the legislature. *Bixler's adm'x* v. *Parker, &c.*, 3 Bush, 166.

94. An appeal prosecuted in the name of a defendant constructively summoned without his knowledge, and dismissed for want of a bond, does not affect his right to proceed in the court below to vacate the judgment. *Parks' ex'r* v. *Cooke*, 3 Bush, 168.

95. Exceptions to depositions not acted upon by the court below, will be deemed to be waived. (3 Met., 397.) *Lewis* v. *Wright*, 3 Bush, 311.

96. The grounds for a new trial must be specified in writing. Errors not so stated cannot be considered either in the circuit court or court of appeals. (Civil Code, sec. 372.) *Hopkins* v. *Commonwealth*, 3 Bush, 480.

97. Parties will not, in a revising court, be allowed to call in question a judgment procured at their instance. (Todd, &c. v. McClanahan's heirs, 1 J. J. Marshall, 356) *Stone and wife* v. *Werts, &c.*, 3 Bush, 486.

98. Two appeals taken on same record: cost of transcript last filed must not be included in costs of party filing it. *Dean* v. *Ball*, 3 Bush, 502.

99. No question in the court of appeals can arise on the propriety of instructions given, unless exception was taken to the ruling of the court below. *Lanham* v. *Commonwealth*, 3 Bush, 528.

100. Appeals from judgments of county court establishing, altering, or discontinuing ferries, may be prosecuted in the circuit court without supersedeas bond. (Civil Code, secs. 20, 22, &c.) *Ballow* v. *Pettus, &c.*, 3 Bush, 608.

101. The court of appeals can enforce its mandates by rule against inferior courts. (Civil Code, sec. 902; 6 B. Mon., 638.) *Watson, &c.* v. *Avery, &c.*, 3 Bush, 635.

102. The mandate of the court of appeals, and the order directed by it, must be entered before the chancellor has power to suspend its execution, even for good cause. *Watson, &c.* v. *Avery, &c.*, 3 Bush, 635.

103. Dismissing appeal by court of common pleas remitted it to the magistrate whose judgment was appealed from, and court

of common pleas properly refused a writ of prohibition against the enforcement of the judgment by the justice who rendered it; and also properly overruled a motion to confirm the judgment appealed from. *Olmstead, &c.* v. *Mason, &c.*, 3 Bush, 693.

104. The court of appeals has no jurisdiction over a judgment for less than fifty dollars, rendered by the city court of Louisville for misdemeanor. *Holden* v. *Commonwealth*, 2 Bush, 36.

105. Court of appeals will not reverse a judgment by default against constable and his sureties, because the petition fails to state demand and refusal to pay. *Harris, &c.* v. *Perry*, 2 Bush, 101.

106. Court of appeals will not regard *ex parte* papers, exhibited for the purpose of correcting inaccuracies or defects supposed to exist in the record. *Thompson* v. *Probert*, 2 Bush, 144.

107. When judgment by default recites that the cause was heard, court will presume that the necessary proof was heard. *Dehoney* v. *Sandford*, 2 Bush. 169.

108. When the amount gives jurisdiction, the amount claimed before the justice is what determines the jurisdiction on appeal. *Donahue* v. *Murray*, 2 Bush, 194.

109. The amount in controversy being over $50, the Jefferson court of common pleas has jurisdiction on appeal from judgment of justice, however small the judgment may be. *Donahue* v. *Murray*, 2 Bush, 194.

110. The court of appeals will consider the effect of a rejected deposition, and if it could not change the result, the judgment will not for that cause alone be reversed. *Walrath* v. *Viley*, 2 Bush, 478.

111. If party does not set forth a cause of action in his petition, and judgment should be rendered by default, defendant may reverse it for errors on the face of the record. *Humphreys* v. *Walton, &c.*, 2 Bush, 580. So much of this case as assumes that a motion for a new trial is a prerequisite, where the case was tried before the court prior to an appeal being granted, is overruled by the case of *Union Ins. Co. of Louisville* v. *Groom*, 4 Bush, 289.

112. Unless the judgment on the appeal is more favorable to the appellant than the original judgment, he shall pay the costs

of the appeal. Where he succeeds in reducing the amount of the judgment against him, it shall be at the discretion of the court to allow him costs. This applies to appeals from judgments of justices of the peace. (Sec. 850, Civil Code.) *Gentry* v. *Doolin*, 1 Bush, 1.

113. Unessential irregularities will not be regarded by the court of appeals, if a just decision can be made on the record as presented to the court. *Fritz v. Tudor*, 1 Bush, 28.

114. The case of *Robinson* v. *Mobley*, 1 Bush, 196—which decides that a judgment by default without service of process is a clerical misprision—is overruled by the case of *Long, &c.* v. *Montgomery*, 6 Bush, 395.

115. Party who has executed a defective appeal bond should be given a reasonable time to execute a proper one, and it is error to refuse to permit a new bond to be given. *Waters* v. *Patrick*, 1 Bush, 223.

116. A defendant constructively summoned may prosecute an appeal, and have the judgment reversed for errors in the record. (14 B. Mon., 272; 1 Met., 649; 4 Met., 342.) *Salter* v. *Dunn, &c.*, 1 Bush, 311. The prosecution of the appeal is an appearance in the action, and will preclude him from proceeding under sec. 445, Civil Code, to reopen the case upon all questions decided by the court of appeals. The judgment of the court of appeals on the validity of the attachment was binding on the lower court. *Same*, 311.

117. Persons who by petition ask to be made parties to an action, may appeal from the order refusing the application. *Berry, &c.* v. *Hamilton*, 1 Bush, 361.

118. When the right to take an appeal has been barred by the statute of limitations, neither the modification nor repeal of the statute will be construed to extend the time of taking the appeal, or as embracing such actions without express provisions to that effect. *Cassity* v. *Storms, &c.*, 1 Bush, 452.

119. Defendant constructively summoned, by appealing from the judgment below, will be held to have appeared in the court below on the day the mandate is entered; and no judgment can be rendered against him at that time. *Beazley* v. *Maret, &c.*, 1 Bush, 466.

ARBITRATION AND AWARD.

1. Parties agree to submit matters of dispute to arbitration —the award to be made out within a stated time, and to be returned to a named term of the court; but was not made or returned within the time required. *Held* not to be binding. *Burnam* v. *Burnam*, 6 Bush, 389.

2. Parol submission and award, not involving title to land, may be good. *Royse's adm'r, &c.* v. *McCall*, 5 Bush, 695.

3. A submission to two arbitrators, who, in case of disagreement, are authorized to select an umpire: it is the duty of the arbitrators to make the award, and the umpire is unauthorized to act until they disagree; and an award made by all of them will not be enforced. *Royse's adm'r* v. *McCall*, 5 Bush, 695.

ARREST.

1. A peace-officer can make an arrest without a warrant only where a public offense is committed in his presence, or where he has reasonable grounds for believing a felony has been committed. *Jamison* v. *Gaernett, &c.*, 10 Bush, 221.

2. The provision in the city charter of Louisville authorizing policemen to arrest, with or without warrant, etc., was not intended to vary the general law, even if it could constitutionally be done. *Jamison* v. *Gaernett, &c.*, 10 Bush, 221.

3. Civil Code, secs. 179, 180, require an affidavit to be filed, before the order of arrest is issued, and the clerk has no authority to make such an order without the affidavit. *Pauer* v. *Simon*, 6 Bush, 514.

4. If the affidavit in fact was made, and the record does not show it, the matter should be corrected in the circuit court. *Pauer* v. *Simon*, 6 Bush, 514.

5. A bail bond executed by defendant, to be released from an unauthorized order of arrest, is invalid; and judgment thereon should be reversed by the court of appeals. *Pauer* v. *Simon*, 6 Bush, 514.

6. On motion to vacate an order of arrest, the defendant may show that he has turnpike road stock in a road incorporated by

the State; and, under the Code, it will be regarded as property. *Field* v. *Montmollin*, 5 Bush, 455.

7. Writ of arrest may be issued and executed on Sunday, on a person charged with felony. *Watts, &c.* v. *Commonwealth*, 5 Bush, 309.

8. A party leaving the State on business temporarily, or on a visit, with the purpose to return within a reasonable time, is not such a departure from the State as to authorize an order of arrest. (Sec. 180, Civil Code.) *Myall, &c.* v. *Wright*, 2 Bush, 130.

ARREST OF JUDGMENT.

See ACCESSORIES; JUDGMENT; and CRIMINAL LAW AND PROCEEDINGS.

ASSAULT.

1. For an assault by a clerk of a steamboat on a passenger, he recovered $4,400 damages against the owners of the boat. *Held* to be right. *Sherley, &c.* v. *Billings*, 8 Bush, 147.

2. Indictment charging an assault with intent to rob is substantially good, although it alleges no act or fact indicating any design to rob the person assaulted. *Dickerson* v. *Commonwealth*, 2 Bush, 1.

ASSIGNMENTS.

1. Where assigned claims and judgments are attempted to be set off against each other, who has the superior equity. *Pfeiffer, &c.* v. *Harris*, 11 Bush (Oct. 13, 1875).

2. If a written lease contains stipulations other than for payment of money or property for the leased premises, then such writing is not assignable by the landlord so as to vest a right of action in the assignee alone. *Helburn & Co.* v. *Mofford, &c.*, 7 Bush, 169.

3. The claim of an assignee of a lease against his assignor, in the event of eviction, rests on the ordinary responsibility result-

ing from an assignment, which binds the assignor to refund if the eviction is legally effected, without waiver of the assignee's right. *Winstell, &c.*, v. *Helm*, 6 Bush, 58.

4. A chose in action may be assigned by parol. *Gray, &c.* v. *Briscoe*, 6 Bush, 687.

ASSIGNMENTS BY OPERATION OF LAW, UNDER THE ACT OF 1856.

1. The act of 1856 is not a bankrupt law, nor an insolvent act. (Ebersole & McCarty v. Adams, 10 Bush, 83.) Under its operation, a mortgage, made in contemplation of insolvency, and to prefer one or more creditors, will, upon the petition of any creditor, be declared to be an assignment for the benefit of all the creditors. The existence of the Federal bankrupt law does not prevent the State courts from affording this character of relief, and from administering the property thus conveyed. *Linthicum* v. *Fenley*, 11 Bush (April 13, 1875).

2. When, under the act of 1856, a mortgage has been declared an assignment for the benefit of all the mortgagor's creditors, if the mortgagor files his petition in bankruptcy, his assignee in bankruptcy takes just such title to the property mortgaged as the bankrupt himself held—and that is, the equitable right to such portion of the proceeds as shall remain after the payment of all debts owing to the legal beneficiaries under the mortgage. *Linthicum* v. *Fenley*, 11 Bush (April 13, 1875).

3. Creditors claiming under a mortgage which has been declared, under the act of 1856, an assignment, cannot be forced to prosecute their claims in the bankrupt court. Their rights, as well as those of the bankrupt's assignee, will be protected in the State court. *Linthicum* v. *Fenley*, 11 Bush (April 13, 1875).

4. The law governing mortgages by an insolvent debtor, settled. *Thompson, &c.* v. *Heffner's cx'rs, &c.*, 11 Bush (Oct. 1, 1875.)

5. If a mortgage is made in contemplation of insolvency, and with the design to protect the mortgagees against loss to the exclusion of other creditors, it is within the statute commonly known as the act of 1856 (the same as sec. 1, art. 2, chap. 44 of Gen. Stat.), and should be declared a general assignment or

transfer for the benefit of all the creditors. Both insolvency and a sale, mortgage or assignment to or for the benefit of a creditor, must concur before the trust for creditors can result from the operation of the statute. (Temple, Barker & Co. v. Poyntz, 2 Duvall, 277.) But if the debtor's assets exceed his own debts, it must be shown that he knew, with reasonable certainty, that he would be called on to pay enough of his suretyship or indorsements or liabilities for others, when added to his own indebtedness, to render him unable to pay all. He must *know* that he is insolvent. *Thompson, &c.* v. *Heffner's ex'rs, &c.*, 11 Bush (Oct. 1, 1875.)

6. The act of March 10, 1856, to prevent fraudulent assignments, is not a bankrupt law nor an insolvent act. *Ebersole & McCarty* v. *Adams, &c.*, 10 Bush, 83.

7. State courts may relieve against fraud amounting to an act of bankruptcy, unless the bankrupt court has taken jurisdiction. *Ebersole & McCarty* v. *Adams, &c.*, 10 Bush, 83.

8. State Legislatures have power to pass bankrupt or insolvent laws not conflicting with the act of Congress. (Ogden v. Saunders, 12 Wheat, 273; Boyle v. Zacharie, 6 Peters, 348; Baldwin v. Hale, 1 Wallace, 223.) *Ebersole & McCarty* v. *Adams, &c.*, 10 Bush, 83.

9. The act of 1856 does not conflict with the bankrupt law of Congress, and is not superseded or repealed by it. *Ebersole & McCarty* v. *Adams, &c.*, 10 Bush, 83.

10. A suit under the act of March 10, 1856, to set aside a fraudulent conveyance, is not instituted unless summons is sued out within six months. *Cecil* v. *Sowards, &c.*, 10 Bush, 96.

11. An insolvent debtor may prefer a creditor by mortgage, pledge, or payment of his debt, and it will be respected by courts of equity, unless attacked under the act of 1856. *German Security Bank, &c.* v. *Jefferson, &c.*, 10 Bush, 326.

12. An agreement of the principals in a note to keep their surety indemnified, by the use and application, as the surety might desire, of a particular fund, in case she should require them to do so, was not such a contract as gave her a valid and enforceable claim against that particular fund; and

In such a case, the subsequent transfer of the fund to the surety by the principals, when they were insolvent, was an at-

tempt upon their part, in contemplation of insolvency, to prefer such surety to other creditors. *Elliott, Ware & Co.* v. *Harris, Nahan & Co.*, 9 Bush, 237.

13. See FRAUDULENT CONVEYANCES. (9 Bush, 692.)

14. Act of 1856 does not prevent sales of property not subject to execution. *Brewer & Orr* v. *Cosby*, 8 Bush, 388.

15. Mortgage of growing crop of tobacco by insolvent debtor, when it was not subject to execution, did not operate as an assignment of all of debtor's property to his creditors under said act. Such a mortgage is valid, although made to prefer one creditor over the others. *Brewer & Orr* v. *Cosby*, 8 Bush, 388.

16. Dower of surviving wife is barred by a conveyance executed by husband and wife, which was adjudicated to be within the act of 1856. (Art. 2, chap. 44, Gen. Stat., 490.) *Cantrill* v. *Risk*, 7 Bush, 158.

17. Land sold under execution may afterwards be subjected and resold for *pro rata* distribution among all the creditors of the owner, by proceedings under the act of 1856. (Gen. Stat. 490.) And where the purchaser, in such case, fails to get the title under the execution, he may have the sale bonds set aside and the levy and sale quashed. *Tucker, &c.* v. *Fogle*, 7 Bush, 290.

ASSIGNOR AND ASSIGNEE.

1. The assignment of a note vests the assignee with the legal title, subject to any defense which the obligee might have used before notice of the assignment. *Garrott* v. *Jaffray & Co.*, 10 Bush, 413.

2. The assignee of a note can not be divested of his legal title to it by any judicial proceedings to which he is not a party. *Garrott* v. *Jaffray & Co.*, 10 Bush, 413.

3. Money wrongfully recovered by attachment of the obligor in a note, in a suit against obligor and obligee, without making the assignee of the note a party, may be recovered by the assignee. *Garrott* v. *Jaffray & Co.*, 10 Bush, 413.

4. The liability of an assignor is fixed by the law of the place where the assignment is made. *Hyatt* v. *Bank of Kentucky*, 8 Bush, 193.

5. As between maker and payee of a note executed and payable in Louisiana, the legal effect of the note must be determined by the law of that State. *Hyatt* v. *Bank of Kentucky*, 8 Bush, 193.

6. But as between assignor and assignee, the legal effect must be determined of the assignment by the law of Kentucky where the assignment was made; and to make the assignor liable, assignee must use due diligence against payor. *Hyatt* v. *Bank of Kentucky*, 8 Bush, 193.

7. The note was executed and payable in Louisiana, and was indorsed before maturity, and discounted by a bank in Kentucky. The bank sued, and sought to make the assignor liable as for an indorsement of a bill of exchange. The paper being a promissory note, by the law of Kentucky he is not liable as an indorser of a bill. *Hyatt* v. *Bank of Kentucky*, 8 Bush, 193.

8. Assignee in bankruptcy may sue in the State courts to recover the title and possession of the bankrupt's property. *Boone, assignee, &c.* v. *Hall, &c.*, 7 Bush, 66.

9. When notes which have been assigned mature at different dates, the assignee must use proper diligence to collect each note, or else he cannot recover against the assignor on his liability implied by his assignment of the note. *Coleman's ex'r* v. *Tully's adm'r*, 7 Bush, 72.

10. Failing to prosecute suit on part of the notes in proper time, and afterwards bringing suit to subject land to payment of all the notes, which paid only a part of the aggregate debt; assignee cannot apply proceeds of land to payment of notes on which due diligence has not been used, to the prejudice of assignor. *Coleman's ex'r* v. *Tully's adm'r*, 7 Bush, 72.

11. The rule that assignee must obtain judgment and have return of *nulla bona* before he can hold assignor liable, is not inflexible, and evidence of such diligence has been dispensed with: 1. By the removal of the debtor from the State after assignment, before the note fell due; 2. The debtor having been declared a bankrupt, a few days after the maturity of the note; 3. Where a *fi. fa.* issued, and was levied on land and sold, and afterwards the land was made liable under the act of 1856 to payment of all the debtor's creditors *pro rata*, another *fi. fa.* was not necessary to be issued. The proceeding under

said act demonstrated the debtor's insolvency sufficiently; and assignor became liable on his assignment to the assignee. *Tucker* v. *Fogle*, 7 Bush, 290.

12. Assignment of a note secured by lien, assigns the lien also. *Forwood* v. *Dehoney*, 5 Bush, 174.

13. As between assignor and assignee, the latter may claim priority; but where he only claims *pro rata* share of proceeds of the lien property, it should be so adjudged. *Forwood* v. *Dehoney*, 5 Bush, 174.

14. Assignor wrote his name also under the name of obligor. The circumstance shows he intended to become bound as guarantor. The obligor can be sued alone on the note; and the mislocation of assignor's name did not invalidate the note. *Cason* v. *Wallace*, 4 Bush, 388.

15. The assignor cannot sue, in such case, upon the original consideration of the note. *Cason* v. *Wallace*, 4 Bush, 388.

16. Contract to pay rent and to make certain improvements not assignable at law, so as to vest right of action in the assignee alone. The assignor is a necessary party. *Hicks & Gill* v. *Doty*, 4 Bush, 420.

17. Assignment of wife's legacy only passes husband's contingent right thereto; and if not reduced to possession during his life, it survives to the wife. If not due at the time of the husband's death, unless the executor anticipated the time of payment, which he properly refused to do, the assignee does not get the legacy. *Dunn* v. *Lancaster*, 4 Bush, 581.

18. The assignor guarantees the genuineness of the note, as to the apparent parties; but in order to hold the assignor liable as assignor or guarantor, the holder must pursue due diligence to test the insolvency as well as liability of the obligors. *Wynn* v. *Poynter*, 3 Bush, 54.

19. The court should instruct the jury to find for defendant, where no legal diligence is shown nor agreement dispensing with suit on the assigned note. *Wynn* v. *Poynter*, 3 Bush, 54.

20. The plaintiff ought to test the genuineness of the obligor's signature by verdict and judgment; and if, after plea of *non est factum*, he dismisses his suit, he cannot recover against his assignor on the implied warranty of genuineness. *Wynn* v.

Poynter, 3 Bush, 54. But if the assignor knew that the signature was a forgery, would he not be liable for the fraud?—[EDITOR.

21. The assignee forbears to sue, at the peril of releasing any party to the note who may be able to prove that in fact he was only surety thereto. It is his business to inquire if any of the obligors is only surety; not the duty of surety to know of the assignment, and notify assignee that he is surety only. *Day* v. *Billingsly*, 3 Bush, 157.

22. Where assignee knows, at the time of the assignment of a note, with interest payable annually, that it is stipulated in the deed that, if the interest should be unpaid for thirty days after it becomes due, then the whole debt, with accrued interest, shall be due and payable as if the full time had expired, and he fails to enforce his lien by proper diligence, he thereby exonerates the assignor. *Parks' ex'r* v. *Cook*, 3 Bush, 168.

23. Order for part of a judgment is not an assignment of the judgment, but evidence of indebtedness that may be enforced on refusal to accept or pay the order. *Thomas* v. *Porter*, 3 Bush, 177.

24. The assignee of a note on a married woman, in a suit against her and the assignor, may allege that she is a *feme covert;* and if she avails herself of her married condition when the note was made, that will entitle the assignee to recover against the assignor. *Hughes' adm'r* v. *Brown, &c.*, 3 Bush, 660.

25. The assignee of a note as collateral security is not bound to use technical diligence; but if the assignor notifies him of the impending insolvency of the obligor, and requires suit to be immediately brought or the note surrendered, and he refuses to do either, and the debt is lost in consequence of the failure to sue, the assignee will be responsible for the note. *Bonta* v. *Curry*, 3 Bush, 678.

26. B. transferred to C. a note on W. for $1,000, due Feb. 10, 1862, and bound himself to pay C. said sum with interest, on ten days' notice, if W. did not meet the note when due. In Nov., 1865, C. notified B. that W. had not paid the note. *Held* —that as C. had delayed for an unreasonably long time to

notify B., after the note fell due, of its non-payment, B. was released on the contract of assignment. *Bowman* v. *Curd*, 2 Bush, 565.

ATTACHMENTS.

1. Attachment liens upon land adjudged superior to a mortgage made several years previous, where it clearly appears that no definite acceptance of the mortgage had taken place prior to the attachment. *Bell* v. *Farmers' Bank, &c.*, 11 Bush (Feb. 15, 1875).

2. Section 5, article 21, chapter 28, of the General Statutes, is confined to justices' courts; and does not purport to regulate the general law upon the subject of attachments. The act of March 15, 1870 (Acts 1869–'70, page 90), provides the same remedy for other courts, and is not repealed. *Smith* v. *Belmont & Nelson Iron Co., &c.*, 11 Bush (Oct. 13, 1875).

3. The act of March 15, 1870 (Acts 1869–'70, p. 90), which authorizes garnishee before judgment or return of no property, was not repealed by the General Statutes, and is in effect an amendment to section 221 of the Civil Code. *Smith* v. *Belmont & Nelson Iron Co., &c.*, 11 Bush (Oct. 13, 1875).

4. The bankrupt act of 1867 dissolves attachments against the bankrupt's estate, made within four months, sued out in the State courts as well as Federal courts. *Bank of Columbia* v. *Overstreet, &c.*, 10 Bush, 148.

5. A claimant of attached property may assert his claim, as provided by sec. 257 of the Civil Code; and, having acquired title, may recover the property on showing the attachment to be invalid, or that it has been dissolved by operation of law. *Bank of Columbia* v. *Overstreet, &c.*, 10 Bush, 148.

6. Where exempted property was sold under attachment, and the proceeds are in court at the death of the debtor, they pass to the widow and children. The presence of the wife at the sale, and not objecting, does not operate as a waiver of her right. *Myers' adm'r, &c.* v. *Forsythe*, 10 Bush, 394.

7. A debt created by an implied contract may be collected by attachment. In this respect, the Code makes no distinction between express and implied contracts. *Garrott* v. *Jaffray & Co.*, 10 Bush, 413.

8. Money wrongfully recovered by attachment of the obligor in a note, in a suit against obligor and obligee, without making the assignee of the note a party, may be recovered by the assignee. *Garrott* v. *Jaffray & Co.*, 10 Bush, 413.

9. Order of justices' or quarterly courts sustaining an attachment may be appealed from, without appealing from the personal judgment for the debt. And execution may issue on the judgment, but the sale of the attached property will be stayed till judgment on the appeal. *Hawkins* v. *Baldauf & Bro.*, 10 Bush, 624.

10. Where an attachment has been levied on land, it is not liable to seizure and sale under execution issued pending the attachment suit, so as to defeat the attachment. *Husbands* v. *Jones, &c.*, 9 Bush, 218.

11. Where a portion of the land attached was sold under order of court, and satisfied the debt, the portion not so sold will be subjected to the satisfaction of prior liens on the entire land; and if not sufficient, so much of the portion sold under the attachment will be subjected as is necessary to satisfy the residue. *Husbands* v. *Jones, &c.*, 9 Bush, 218.

12. Pension money received from the United States is not liable to attachment, levy or seizure, by or under any legal or equitable process whatever. *Eckert & Co.* v. *McKee, &c.*, 9 Bush, 355.

13. Money due a common school teacher cannot be attached in the hands of the school commissioner. *Tracy & Lloyd* v. *Hornbuckle and wife*, 8 Bush, 336.

14. The act approved 15th March, 1870, to authorize creditors in certain cases to garnishee, before judgment and return of "no property," contemplates subjecting the equitable assets of the debtor which cannot be levied on and sold under execution. *Jenkins* v. *Jackson, Loving & Co.*, 8 Bush, 373.

15. The plaintiff may institute a suit for the discovery of any money, choses in action, &c., and sue out attachment without affidavit or bond; but must allege and show that an execution was issued and directed to the county of defendant's residence or where the judgment was rendered and returned "no property found," by the proper officer. (Secs. 474, 476, Civil Code.) *Maddox, &c.* v. *Fox, &c.*, 8 Bush, 402.

16. Although real estate was conveyed to and held in the firm name, it was not made to appear that it was purchased with partnership funds nor for partnership purposes, and so appropriated: *Held*, subject to attachment to pay individual debts of members of the firm. *Bank of Louisville* v. *Hall & Long*, 8 Bush, 672.

17. A bond superseding that part of the judgment which sustained the attachment, &c., was substituted for another bond executed by mistake superseding the entire judgment. *Ross, &c.* v. *Wilson, Peter & Co.*, 7 Bush, 29.

18. The Mobile and Ohio R. R. Co. cannot be proceeded against by attachment on the ground that it is a foreign corporation. *Martin & Merriwether* v. *Mobile & Ohio R. R. Co.*, 7 Bush, 116.

19. The property attached had been previously mortgaged to pay plaintiffs' as well as other debts; plaintiffs cannot appropriate the mortgaged property to pay their debt without alleging that the residue of the debts had been paid, and bringing the trustees or other legal title-holders before the court. *Martin & Merriwether* v. *Mobile and Ohio R. R. Co.*, 7 Bush, 116.

20. Before issuing an attachment, a bond must be executed before the clerk or his deputy, as required by sec. 224, Civil Code. *Horne, Semple & Co.* v. *Mitchell*, 7 Bush, 131.

21. A bond not taken by the clerk or his deputy, before issuing the attachment, is not a defective bond, which can be substituted by a new bond, as provided for in sec. 753, Civil Code. *Horne, Semple & Co.* v. *Mitchell*, 7 Bush, 131.

22. A bond to return property, etc., executed under sec. 211, Civil Code, by plaintiff to defendant, inures to the benefit of another party to whom the property is adjudged, although he was made a party to the suit on his own motion, and although the covenant was not in express terms to the party to whom the property was adjudged. *McGlasson* v. *Bradford*, 7 Bush, 250.

23. Sureties in attachment bonds executed under secs. 235, 242, of the Civil Code, are released by the discharge in bankruptcy of the principal in the bonds before any judgment was rendered against him. *Payne & Bro.* v. *Able, &c.*, 7 Bush, 344.

24. Plaintiff must state that his claim is just, in the affidavit for an attachment; and if he fails to so state, court of appeals

will reverse judgment. Upon return of the case, the court below should permit plaintiff to amend the affidavit within a reasonable time. *Bailey* v. *Beadles & Bolinger*, 7 Bush, 383.

25. Jurisdiction of the court in attachment cases depends upon the actual or constructive service of defendant, and not upon the affidavit or clerk's order. (Allen v. Brown, 4 Met., 346.) *Bailey* v. *Beadles & Bolinger*, 7 Bush, 383.

26. Where plaintiff sues out attachment without any grounds to believe that the defendant intends to perpetrate a fraud on his creditors, the law implies malice, and an action lies without proof of actual malice. *Fullenwider* v. *McWilliams*, 7 Bush, 389.

27. The jury are the best judges of the effect the attachments for fraud had on the credit, character, and feelings of defendant. *Fullenwider* v. *McWilliams*, 7 Bush, 389.

28. A bond executed by third parties for the forthcoming of property under sec. 235, Civil Code, may be enforced by sale or suit; and the obligors should be allowed to litigate the existence and extent of their liability, and exercise the alternative right of discharging the bond by producing the property; and a peremptory rule against them is erroneous. *Oppenheimer* v. *Riley*, 6 Bush, 118. (2 Met., 209; 3 Met., 456; 3 Met., 558.)

29. When by an attachment wrongfully obtained, a party is prevented from performing a contract, and material or property prepared or procured by him to do so is depreciated in value, such damage to the materials and damages sustained by being prevented from completing the work are embraced by the attachment bond. *Carpenter, &c.* v. *Stevenson*, 6 Bush, 259. (Sedgwick on the Measure of Damages, 74.)

30. One non-resident may sue out an attachment against another non-resident of this State, under sec. 221, Civil Code. *Gray, &c.* v. *Briscoe*, 6 Bush, 687.

31. A party who fraudulently confounds the goods of a debtor with his own, if they are levied on by attachment, must identify or lose his own property; and the burden of proof is on him who produces the confusion. (Drake on Att., sec. 199; 7 Conn., 274; 39 N. Hamp., 257; 6 Gray, 134.) *Weil & Bro.* v. *Silverstone, &c.*, 6 Bush, 698.

32. Property levied on by attachment may be left by the sheriff with defendant, who will be the sheriff's bailee, and it will not affect the validity of the levy or lien thereunder; but goods afterwards acquired by the defendant, and put into the store with such as are levied on, will not be affected by the attachment lien. *Howell Gano & Co.* v. *Commercial Bank of Ky.*, 5 Bush, 93.

33. Partnership property levied on for debt of one of the partners is first liable to the existing partnership debts. If one partner surrenders partnership property to be levied on to pay debt of a co-partner, he is estopped from asserting title in himself or controverting plaintiffs' right to enforce the levy. *Howell Gano & Co.* v. *Commercial Bank of Ky.*, 5 Bush, 93.

34. Fees and allowances to jailers by the county court being necessary, and provided by law, to enable them to perform their duties as such, cannot be attached. *Webb* v. *McCauley*, 4 Bush, 8.

35. When there is cause of attachment against one co-defendant, under sec. 221, Civil Code, except for non-residency, an attachment is allowed against the other defendants' property. *Duncan* v. *Headley*, 4 Bush, 45.

36. A surety secured by mortgage has no right to an attachment against his principal, without alleging the insufficiency of the mortgage. Being induced by defendant to sue it out, he can not controvert it so as to defeat the attachment, whatever creditors might do. *Jarboe, &c.* v. *Colvin*, 4 Bush, 70.

37. Where there are several attachment creditors and several attachments, which, on motion, are heard by the court without being consolidated, plaintiffs are competent witnesses for each other. *Jarboe, &c.* v. *Colvin*, 4 Bush, 70.

38. Resident creditors, having attached a debt due by a citizen of Kentucky to an insolvent debtor of Ohio, have preference in the courts of Ky. over the assignee of such insolvent debtor, although the assignment was made in Ohio before the attachments were sued out in Ky. *Johnson* v. *Parker, &c.*, 4 Bush, 149.

39. In the foregoing case, it was not shown that there were any foreign creditors, nor that the assignee had executed the bond required by the act of 1860. (Myers' Sup., 553.) Really these are the grounds of the decision. *Johnson* v. *Parker, &c.*, 4 Bush, 149.

40. In a suit on an attachment bond, only such expenses as were incurred in defending the attachment can be recovered; those incurred in defending the cause of action cannot be recovered. *Johnson* v. *Farmers' Bank of Ky.*, 4 Bush, 283.

41. Damages commensurate with the injury may be recovered in an action for a malicious suit and attachment, probable cause not being made out. *Johnson* v. *Farmers' Bank of Ky.*, 4 Bush, 283.

42. Property *in transitu* may be pledged by delivery of the bills of lading therefor; and if the property be attached by creditors of the shipper, while *in transitu*, the pledgee has a preference over the attaching creditors. *Petitt & Co.* v. *First National Bank of Memphis*, 4 Bush, 334.

43. Plaintiff alleges specific sum to be due from garnishee to the defendant debtor, and calls on garnishee to answer, which he fails to do; the plaintiff is entitled to judgment for the amount against garnishee. *Bowen* v. *Emmerson, &c.*, 4 Bush, 345.

44. Owner of a steamboat gave note at Evansville, Indiana, for boilers and repairs of engine, on a special contract by the owner. The boat being attached, by order of the Livingston circuit court, a personal judgment was rendered against the owner, who was served with process, and lien asserted on the boat. *Steamboat Hyatt, &c.* v. *Reitz & Haney*, 4 Bush, 395.

45. When defendant gives bond and surety that he shall perform the judgment of the court (secs. 242, 243, Civil Code), the attachment is discharged, and the grounds for obtaining it cannot be inquired into. *Inman & Carr* v. *Strattan & Snodgrass*, 4 Bush, 445.

46. Third party claimant of attached property, who asserts an unfounded claim and gets possession by executing bond, is to be regarded as bailee in his own wrong, and liable for all accidents and hazards. *Dear* v. *Brannon*, 4 Bush, 471.

47. Indorsement of a levy on land, on an attachment after the return day thereof, is invalid, and no lien is created thereby on the land. In a contest between mortgagees and attaching creditor, mortgagees' lien *held* to be good. *Peters, guardian, &c.* v. *Conway*, 4 Bush, 565.

48. Subsequent mortgagees and subsequent attaching creditors can show defects in prior attachments, and thereby get prior liens out of the way. *Peters, guardian, &c.* v. *Conway*, 4 Bush, 565.

49. Two distinct grounds of attachment in the alternative are deemed sufficient. (Wood v. Wells, &c., 2 Bush, 197.) *Hardy, &c.* v. *Trabue, Davis, &c.*, 4 Bush, 644.

50. The claimant of attached property, who executes bond under sec. 242, Civil Code, is liable on the bond, although the prior lien preferred by him on the property was adjudged in his favor; but the bond cannot be enforced without rule or notice to the obligors; and the execution of the bond does not make him a party to the suit, but he must petition to be made a party to assert his claims. *Taylor* v. *Taylor*, 3 Bush, 118.

51. Claimant of attached property has notice that there is a suit pending about it; and after judgment subjecting property to the attachment, he shall not be heard in defense to the bond, nor in a suit for the recovery of the property or the money for which it was sold. *Miller* v. *Desha & wife*, 3 Bush, 212.

52. To leave the State temporarily on business or a visit, intending to return within a reasonable time, does not authorize the issuance of an order of arrest. (Sec. 180, Civil Code.) *Myall, &c.* v. *Wright*, 2 Bush, 130.

53. It was erroneous to order the sale of attached land without proof of non-residence, or that defendant had left the place of his residence and gone within the military lines of the Confederate States, and remained there voluntarily for more than 30 days. *Jackson* v. *McElroy, &c.*, 2 Bush, 132.

54. A judgment for the sale of land is erroneous, without the affidavit that the defendant has no personal property. (Sec. 251, Civil Code.) *Jackson* v. *McElroy, &c.*, 2 Bush, 132.

55. Compensation to an attorney appointed to defend for a non-resident, cannot be made until he makes a written statement of all he has done in the case, which must be signed by him and filed in the papers. (Sec. 441, Civil Code.) *Jackson* v. *McElroy, &c.*, 2 Bush, 132.

56. The grounds for an attachment may be set forth in the petition, which, if sworn to, will be sufficient. *Burnam* v. *Romans*, 2 Bush, 191.

57. Two grounds of attachment may be set forth in the alternative. *Wood* v. *Wells, &c.*, 2 Bush, 197.

58. Orders in provisional remedies may be directed, at the request of the plaintiff, to any officer to whom a summons might be directed. (Sec. 66, Civil Code.) *Wood* v. *Wells, &c.*, 2 Bush, 197.

59. A party claiming attached property adjudged to be the owner, by showing that, from time to time, he purchased goods to replenish the stock in the store in his name and on his credit, that he rented the house and kept the store insured in his own name. *Steir* v. *Robinson & Co.*, 2 Bush, 307.

60. A statement on oath of the facts is made essential to the issual of an attachment for rent. (Sec. 5, art. 2, chap. 66, Gen. Stat.) *Worstell* v. *Ward*, 1 Bush, 198; *Brandt* v. *Hyatt*, 7 Bush, 363.

61. If the attachment is not returned on the day of its return, reasonable time should be given to the party to appear and defend. *Worstell* v. *Ward*, 1 Bush, 198.

62. Judgment by default against a garnishee, not a party to the suit, is erroneous. *Griswold* v. *Peckenpaugh*, 1 Bush, 220.

63. A judgment for the sale of attached lands being reversed, it is proper for the court below to set aside all the sales made thereunder; and where an attorney in the case purchased the land, and conveyed it to his minor children in consideration of love and affection, they must be regarded as volunteers, subject to all the equities available against their grantor. *Miller, &c.* v. *Hall and wife*, 1 Bush, 229; *Salter* v. *Dunn, &c.*, 1 Bush, 311.

64. In such case, if the purchase money has been paid, the court should make proper orders for the restitution of the money and release of the title, and the purchaser of the land has a prior lien thereon for money paid before the prosecution of the appeal. *Miller, &c.* v. *Hall and wife*, 1 Bush, 229.

65. Defendant constructively summoned, who appears for the first time by appealing from the judgment, will be held to have appeared in the court below on the day the mandate is entered; and no judgment can be rendered against him at that term. *Beazley* v. *Maret, &c.*, 1 Bush, 466.

66. An indebtedness upon commercial or negotiable paper, before its maturity, is not subject to attachment. (Drake on Attachments, sec. 584.) *Greer* v. *Powell, &c.*, 1 Bush, 489.

67. In an attachment in equity, the court may determine the value of property wrongfully attached and converted. The criterion of damages of personal property is its value at the time of conversion. *Greer* v. *Powell, &c.*, 1 Bush, 489.

ATTORNEYS AT LAW.

1. See CORPORATIONS; and COSTS.

2. Agreement in a mortgage or note, to pay attorney's fee if suit is brought to foreclose or collect same, is against public policy, and will not be enforced if resisted by defendant. *Thomasson* v. *Townsend*, 10 Bush, 114.

3. When a judgment by default is rendered for an attorney's fee stipulated for in a writing sued on, the defendant is without remedy. *Thomasson* v. *Townsend*, 10 Bush, 114.

4. Where no chose in action or other claim was put in the hands of the attorney, and no judgment for money was recovered, the attorney has no lien for his services. *Wilson, &c.* v. *House, &c.*, 10 Bush, 406.

5. Disbarring an attorney is a criminal proceeding; and sections 9 and 10, art. 4, chap. 12, of the General Statutes, are applicable. *Baker* v. *Commonwealth*, 10 Bush, 592.

6. The name of an attorney, acting with such personal or professional dishonesty as renders him unworthy of public confidence, should be stricken from the roll. It is not necessary that the offense be indictable. *Baker* v. *Commonwealth*, 10 Bush, 592.

7. Indulgence in vices affecting the moral character, but not personal or professional integrity, is not sufficient grounds for disbarring an attorney. *Baker* v. *Commonwealth*, 10 Bush, 592.

8. Attorneys appointed to defend for absent defendants, and bonds to restore the property, etc., as provided in section 440 of the Civil Code, are for the protection of the interests of the absent defendants, and not to give the court jurisdiction. *Thomas* v. *Mahone*, 9 Bush, 111.

9. The attorney to defend is required to correspond with the defendant, if he can be found; but his failure to do so merely deprives him of the right to compensation, and does not affect the validity of the steps taken by the court. *Thomas* v. *Mahone*, 9 Bush, 111.

10. Although the failure to appoint the attorney or to take the bond as required by section 440, Civil Code, are reversible errors, the jurisdiction being complete, the judgment will not be void. *Thomas* v. *Mahone*, 9 Bush, 111.

11. An attorney's lien upon the claim in litigation attaches at the commencement of the action. *Robertson & Cleary* v. *Shutt, &c.*, 9 Bush, 959.

12. The lien of plaintiff's attorney on a judgment against the defendant can not be defeated by setting off one judgment against another, as in sec. 407, Civil Code. *Robertson & Cleary* v. *Shutt, &c.*, 9 Bush, 959.

13. But in an action which is subject to a set-off, the attorney's claim for services must yield to the set-off. *Robertson & Cleary* v. *Shutt, &c.*, 9 Bush, 959.

14. When an attorney is guilty of malpractice within the presence and personal knowledge of the court, the judge may proceed in a summary way by rule against the attorney to show cause, &c.; but where he has been prosecuted by indictment, and his guilt is confessed or found by a jury, the court has power, upon his guilt thus appearing, to strike his name from the roll of attorneys. *Walker* v. *Commonwealth*, 8 Bush, 86. In this case, Louisville city court exceeded its authority in ordering a rule, instead of directing an information to be filed against the attorney.

15. The fees of counsel employed by a personal representative ordinarily should be borne by the estate. *Wood* v. *Goff's curator*, 7 Bush, 59.

16. The husband is liable for a reasonable fee to the counsel of the wife who sues for alimony and divorce, as part of the costs, where the wife has no estate, and is not in fault. What is a reasonable fee is to be ascertained by evidence; and if the plaintiff has more than one attorney, she must pay all except one, or the fee may be divided among all in any way they see proper. *Whitney* v. *Whitney*, 7 Bush, 520; *Thomas* v. *Thomas*, 7 Bush, 665.

17. An attorney having a debt to collect has no authority to release the sureties upon his client's claim by an indorsement on an execution. *Savings Institution of Harrodsburg* v. *Chinn's adm'r*, 7 Bush, 539.

18. No action will lie to recover money for endeavoring to procure a pardon. *Thompson, &c.* v. *Wharton*, 7 Bush, 563.

19. But where an attorney undertook to save from impending danger of threatened execution, or illegal imprisonment, a prisoner who had been convicted by a military court which was unauthorized by law, he is entitled to recover, because not against public policy. *Thompson, &c.* v. *Wharton*, 7 Bush, 563.

20. After a divorce, the husband cannot be required to pay the wife's attorney's fee in an appeal to the court of appeals, or in a subsequent suit involving questions as to the care, custody, and maintenance of their minor children. *Thomas* v. *Thomas*, 7 Bush, 665.

21. Under the act of Jan. 26, 1866 (Myers' Sup. 685), an attorney has a lien on any judgment he may recover; and therefore was incompetent to testify for his client. *Downing* v. *Bacon, &c.*, 7 Bush, 680. But now, see sec. 22, chap. 37, Gen. Stat., 413.

22. L., as attorney for the Ironton Rolling Mills Co., placed notes for collection in Ross' hands, who covenanted in his receipt to collect them if he could, and account for them when collected. *Held*—that an action was properly maintained on the receipt by the Rolling Mills Co., and was not an action of assumpsit but of covenant; that the limitation of five years did not apply, and that payment to Stall & Ross was a payment to Ross. *Ironton Rolling Mills Co.* v. *Ross' adm'r*, 6 Bush, 104.

23. Payment to plaintiff's attorney is payment to plaintiff. *Ely, &c.* v. *Harvey, Keith & Co.*, 6 Bush, 620.

24. Attorneys for the Commonwealth have no vested interest in forfeited recognizances until reduced to judgment. After judgment, the 30 per cent. to which they are entitled cannot be remitted by the Governor. *Stone* v. *Riddell*, 5 Bush, 349.

25. Lien of an attorney does not attach in an action for unliquidated damages until after judgment. *Wood* v. *Anders*, 5 Bush, 601. This is now altered, and lien made to embrace choses in action, claims, account or other demand, put into attorney's hands for suit or collection. Sec. 15, chap. 5, Gen. Stat., 149.

26. Attorney's lien cannot be defeated by defendant paying or satisfying the judgment in full to plaintiff, and taking his

receipt therefor; and if the sheriff returns the execution satisfied, upon plaintiff's giving him the receipt and ordering the return to be made, the attorney may have the return quashed. *Stephens & Hermes* v. *Farrar Bros.*, 4 Bush, 12.

27. Attorney appointed to defend for non-resident must make out and sign statement of all that he has done in the case, and file it with papers, before order of compensation can be made. (Civil Code, sec. 441.) *Jackson* v. *McElroy*, 2 Bush, 132.

28. An attorney is not liable to an action for money collected by him until after a demand and refusal to pay. Although the statute of limitations will not apply unless there be a demand and refusal, yet the presumption of payment or release arising from length of time may be regarded as sufficient, unless such presumption is repelled by the facts, provided payment is relied on as a defense. *Roberts* v. *Armstrong's adm'r*, 1 Bush, 263.

29. An attorney employed by the Auditor to prosecute a suit to recover escheated land to the Commonwealth, to be compensated out of the property recovered, cannot sell the land, and a sale made by him is void. *Corbin, &c.* v. *Mulligan*, 1 Bush, 297.

30. An attorney is bound to take notice of all irregularities and errors in the record; and every equity and error that will affect his client, will affect the attorney's purchase. *Salter* v. *Dunn*, 1 Bush, 311.

ATTORNEYS IN FACT.

See AGENCY.

AUCTIONEER.

1. Memorandum by auctioneer of the sale of a lot, signed with the name of the purchaser by his authority and in his presence, is sufficient to take it out of the statute of frauds. *Gill* v. *Hewett*, 7 Bush, 10; *Thomas* v. *Kerr*, 3 Bush, 619.

2. He is regarded as the agent of both parties. *Gill* v. *Hewett*, 7 Bush, 10; *Thomas* v. *Kerr*, 3 Bush, 619.

3. While an auctioneer is selling goods for one man, another procures him to sell other goods without disclosing whose they

are. It is a fraud upon the auctioneer and bidders, and entitles the highest bidder to repudiate the sale upon discovering the fraud. *Thomas* v. *Kerr*, 3 Bush, 619.

AUTHORSHIP.

1. An author retains a qualified property in the contents of letters written by him to others. He alone has the right to publish them, and he can enjoin their publication by the recipient or any other person. But the recipient of a private letter has the general property therein, qualified only by the incidental right of the author to publish it himself, or prevent its publication by any person. The recipient can dispose of it in any way other than by publication. *Grigsby and wife* v. *Robert J. Breckinridge*, 2 Bush, 480.

2. Letters received by a woman before marriage, during marriage and widowhood, are the separate property of the wife, which she may dispose of as she chooses, regardless of her husband's will. *Grigsby and wife* v. *Robert J. Breckinridge*, 2 Bush, 480.

BAIL.

1. A bail bond is not rendered invalid because of the omission of the stipulation, that if the defendant failed to perform the conditions, the bail would pay to the Commonwealth the specified sum. *Commonwealth* v. *O'Daniel, &c.*, 9 Bush, 551.

2. A party under bail is constructively in the custody of the law. *Marking* v. *Needy & Hatch*, 8 Bush, 22.

3. Before bondsmen can surrender the accused, he must obtain a certified copy of the bail bond; and he cannot authorize any third person to arrest the accused in any other manner than by his written indorsement on such copy. (Criminal Code, sec. 82.) And a reward for the arrest of a defendant under bail cannot be recovered when such arrest was not authorized. *Marking* v. *Needy & Hatch*, 8 Bush, 22.

4. A prisoner, arrested and brought before the presiding judge of Montgomery county, for examination of a charge of murder

committed in Lewis county, was admitted to bail, the examination being postponed. The bail was unauthorized and the bond void. *Commonwealth* v. *Salyer*, 8 Bush, 461.

5. When a recognizance is taken by the examining court, it must appear from the minutes of the court that the bail undertook that the defendant should appear before some court of competent jurisdiction, for an examination of the charge or for the trial thereof; and no pleadings are necessary in actions on bail bonds or recognizances. (Criminal Code, sec. 80.) *Roberts* v. *Commonwealth*, 7 Bush, 430.

6. Surety signed blank paper before the mayor of Covington, and the county attorney filled it up. The accused, charged with forgery, failed to appear. *Held*—that the bond was in no sense a recognizance, and was properly quashed. *Commonwealth* v. *Ball*, 6 Bush, 291.

7. The city judge of Lexington may take bail, but the clerk of his court cannot do so. Judgment on such bond will be reversed by the court of appeals. *Dugan* v. *Commonwealth*, 6 Bush, 305.

8. Bail bond executed on Sunday is binding. *Watts, &c.* v. *Commonwealth*, 5 Bush, 309.

9. A bail bond taken before two justices of the peace, who tried the writ of *habeas corpus*, was a judicial act, and having the power to admit the prisoner to bail is binding. *Creekmore* v. *Commonwealth*, 5 Bush, 312.

10. An indictment was abated on motion of the attorney for the Commonwealth, under the mistaken belief that defendant was dead. Afterwards, it was reinstated on the docket, defendant was arrested, and gave bail. He having failed to appear, his sureties were held not to be liable, because he was not legally in custody. *Henry* v. *Commonwealth*, 4 Bush, 427.

11. The essentials of a recognizance or bail bond are pointed out in the foregoing case. (See Criminal Code, sec. 80.)

12. A defendant is entitled to be exonerated from bail, according to sec. 116, Criminal Code, when no indictment is found at the term of the court next after the first submission of the charge to the grand jury, if no order is made submitting the charge to another grand jury; and the court should order his discharge; if the court fails to do so, it does not prejudice the defendant or

his sureties, in proceeding on the bond. *Bryant, &c.* v. *Commonwealth*, 3 Bush, 9.

13. The attorney for the Commonwealth is not entitled to any part of the recognizance or bail bond before judgment thereon. *Bryant, &c.* v. *Commonwealth*, 3 Bush, 9.

14. The grand jury twice refused to find an indictment. No further prosecution being attempted, the defendant and sureties had a right to presume that the prosecution was ended. *Commonwealth* v. *Blincoe, &c.*, 3 Bush, 12.

15. Police judges are magistrates, in the meaning of the Criminal Code. A single justice can hold to bail for a misdemeanor; and a bail bond taken on Sunday is binding. *Rice, &c.* v. *Commonwealth*, 3 Bush, 14.

16. That an indictment is defective will not render the recognizance void. *Commonwealth* v. *Skeggs, &c.*, 3 Bush, 19.

17. Quashing indictment did not bar a continuance or renewal of the prosecution for the same offense; nor deprive the surety of the right to arrest the accused, and put him in the custody of the court, and thus bring himself within sec. 94, Criminal Code. *Little* v. *Commonwealth*, 3 Bush, 22.

18. A clerk without authority takes bail bond; it cannot be enforced. *Wallenweber* v. *Commonwealth*, 3 Bush, 68.

19. Bail in penal cases is to secure compliance with the judgment; yet when appearance alone is covenanted for, this must be performed; and if such bond has been taken in pursuance of law, non-appearance will be a sufficient forfeiture. *Wallenweber* v. *Commonwealth*, 3 Bush, 68.

20. County judge indorsed bail bond thus: "M. W. King signed this bond in my presence, on the date above; it was left at the grocery of J. R. Covington to get security; it was returned to me by Mr. Covington with the names of these six persons subscribed as surety." *Held*, not binding. *Covington* v. *Commonwealth*, 3 Bush, 478.

21. Sheriff took invalid bail bond, but defendant appeared thereunder; and if court permits accused to go on such defective recognizances until the next term of the court, sheriff is not responsible on his official bond for the escape of the prisoner. *Commonwealth* v. *Reed, &c.*, 3 Bush, 516.

22. Defendant being under bail appeared and plead not guilty; on his motion, before jury was empanneled, the indictment was quashed. Court ordered the charge to be submitted to another grand jury, and that defendant stand on his bail bond. Defendant was again indicted, but failed to appear; the sureties on the bail bond were bound. (Criminal Code, secs. 78, 160.) *Brewer, &c.* v. *Commonwealth*, 3 Bush, 550.

23. County judge may, at any time before the first term of the circuit court, admit defendant to bail, but not after the term commences. After the first term of the circuit court, he may be admitted to bail by the circuit judge, or in his absence, by the clerk of the circuit court. *Branham* v. *Commonwealth*, 2 Bush, 3.

24. Bail has the friendly custody of the prisoner; and if the latter goes to another State and is imprisoned, the bail will be held responsible on his bond if accused fails to appear. *Withrow* v. *Commonwealth*, 1 Bush, 17.

25. Averment by surety that his principal was necessarily prevented from appearing in court on the day required, because legally confined by process in jail of another county, and that he is yet there, is no defense. *Kirby* v. *Commonwealth*, 1 Bush, 113.

26. In order to secure the prisoner's release, money was deposited with the committing officer, and by him paid to the trustee of the jury fund; the money will be forfeited by defendant's failure to appear as required by law. Commitment to jail on charge of felony is sufficient to show that bail was required. *Dean* v. *Commonwealth*, 1 Bush, 20.

27. Person admitted to bail to appear at next ensuing term of circuit court; no court then held, but accused was indicted at the succeeding term of the court; bail held liable, although a bench warrant issued and prisoner was arrested thereunder—he having made his escape from the sheriff. *Commonwealth* v. *Branch*, 1 Bush, 59.

28. Pending a motion for judgment on the forfeiture of the recognizance, the accused came into court and surrendered himself, and moved the court to remit the recognizance; which was

done, and held to be right. *Commonwealth* v. *Davidson*, 1 Bush, 133.

29. When principal in bail bond had been arrested and removed from the county by an officer of the United States Government, the surety cannot be held responsible on the bond. *Commonwealth* v. *Webster*, 1 Bush, 616.

BAILMENT.

1. A person who has goods on the terms of sale and return, may sue for any damage done to them while in his possession. (1 Chitty's Pleading, 151.) *Robinson, &c.* v. *Webb*, 11 Bush (Oct. 23, 1875).

2. A sale of property by a bailee, without the consent of the bailor, cannot divest the latter of his title. *Vaughn, &c.* v. *Hopson*, 10 Bush, 337.

3. In gratuitous bailment, only ordinary care is required of the bailee; and he is responsible only for fraud or gross negligence, which will not be presumed if the bailment receives the same care as his own property of like value. *Ray's adm'rs* v. *Bank of Kentucky*, 10 Bush, 344.

4. An act of Congress forbids, under heavy penalty, removal of spirits from any place of storage, except between sunrise and sunset. In case of fire at night, which would inevitably result in destroying said spirits (whisky), it was the warehouseman's duty to remove same; and if he failed to do so, he is liable to the owner for its loss. *Macklin* v. *Frazier*, 9 Bush, 3.

5. As to character or degree of diligence required in removing whisky stored in bonded warehouse, see *Macklin* v. *Frazier*, 9 Bush, 3.

6. See BONDS. (9 Bush, 675.)

7. Commission merchants are required to sell property consigned to them within a reasonable time after receipt; and having failed, for five months, to sell tobacco consigned to them in New York, are liable for its value, as if converted or appropriated to their use. *Atkinson & Co.* v. *Burton*, 4 Bush, 299.

8. Hirer of slave for term not expired when slavery was abolished, is entitled to an abatement, *pro tanto*, of the promised hire.

Hiring implies a warranty of title; and if it fails from any legal cause, then so far there is a failure of consideration. *Mundy* v. *Robinson*, 4 Bush, 342.

9. A third party getting possession of attached property by executing bond under the Code, is a bailee, and liable for all accidents. *Dear* v. *Brannon*, 4 Bush, 471.

10. The borrower of a mare to ride about three miles, put her in a buggy and drove twelve or fourteen miles; the mare died in possession of the bailee. He was held responsible for her value. Whether the relation between the illegal act, and the damage sustained, was sufficiently proximate to create a liability on the part of the wrong-doer, is a question of law to be decided by the court. *Kennedy* v. *Ashcraft*, 4 Bush, 530.

BANKS.

1. The charter lien of a bank on the stock of its debtor is a lien created by law, and entitled only to the same preference allowed partnership over individual creditors. *German Security Bank, &c.* v. *Jefferson, &c.*, 10 Bush, 326.

2. In such case, if the bank shall have applied the bank stock to the payment of the debt due by the stockholder, it shall be postponed until the general creditors have been made equal out of the general estate, and the residue will be distributed *pro rata* among all the creditors. *German Security Bank, &c.* v. *Jefferson, &c.*, 10 Bush, 326.

3. A bailee of deposits for accommodation is required to use only the care a prudent person exercises over his own similar property, and good faith in selecting agents to whom they are intrusted. *Ray's adm'rs* v. *Bank of Kentucky*, 10 Bush, 344.

4. The bailee of deposits is not responsible for the fraud of his agent, unless prior to such fraud he had reasonable grounds to suspect his integrity. (Shakers v. Underwood, &c., 9 Bush, 609; 17 Mass., 479; 2 Privy Council, 317.) *Ray's adm'rs* v. *Bank of Kentucky*, 10 Bush, 344.

5. Special deposit of money was made with one bank, and afterwards transferred to a new bank, at the same place, with the same officers, and was embezzled by its cashier. *Held*—if the depositor directly or by implication consented, or acquiesced

in the transfer before the loss, the former bank was released from all liability. If the depositor looked to the former bank as his bailee, prior to the loss, it is liable only for the gross negligence of its agent, the new bank. *Ray's adm'rs* v. *Bank of Kentucky*, 10 Bush, 344.

6. Bank directors are liable for loss occasioned by their negligence. *United Society of Shakers* v. *Underwood, &c.*, 9. Bush, 609.

7. Only ordinary care is required of a bank in keeping special deposits. *Ibid.*

8. If such deposits are lost by gross negligence or willful inattention on the directors' part, the bank is liable therefor. *Ibid.*

9. Bank directors are trustees for stockholders; and are, in a qualified sense, the bank itself. It is their duty to exercise a general supervision, and to direct and control its subordinate officers in all important transactions. *Ibid.*

10. Bank directors are liable to special depositors. *Ibid.*

11. The contract of directors is not with the bank alone, but with all the patrons of the corporation. *Ibid.*

12. Slight diligence, at least, in preventing wrongful conversion of special deposits to the use of a bank, is a legal duty, which the directors were under obligations to special depositors to perform. *Ibid.*

13. The right to recover in such case does not rest alone on the contract of bailment, and the implied contract resulting therefrom. *Ibid.*

14. If the directors were guilty of a breach of duty amounting to tort, they may be held to account. *Ibid.*

15. If the directors knowingly permitted the sale of special deposits, they thereby became participants in the wrong. *Ibid.*

16. It was the duty of directors, having notice, to prevent sales of special deposits. A declaration of dividends was a ratification of the conversion. *Ibid.*

17. Averments that the directors "and each of them had or could have had . . . . notice," and that they each "had notice as well from . . . . as from . . . . ," are not such alternative charges as to be demurrable. *Ibid.*

18. It is the duty of bank directors to acquire knowledge of the business of the bank, and they are not excused, when, from inattention, they are not apprised of facts shown on the books of the bank. *Ibid.*

19. It is sufficient, in an action such as this, to show evidences of misconduct, such as must have come to the directors' knowledge but for negligence or willful carelessness in the discharge of their duties. *Ibid.*

20. The joinder of the president with other directors of the bank, as a co-defendant, is not objectionable. *Ibid.*

21. It was not, in this case, necessary to aver what officer of the bank abstracted or sold the special deposits. *Ibid.*

BANK CHECKS.

1. A check is an appropriation of so much money to the holder in the hands of the banker, and cannot be withdrawn after notice; and it is never treated as overdue, and is free from all equities. *Lester & Co.* v. *Given, Jones & Co.*, 8 Bush, 357.

2. Check on a bank need not be presented for payment until the day after it is received; and no laches can be imputed to holder for not presenting it before. A presentation on the next day, before the close of the usual banking hours, is sufficient. *Cawein* v. *Browinski*, 6 Bush, 457. In *Smith & Campbell* v. *Jones*, 2 Bush, 103, it was *held* that a check does not require due diligence, and laches in presenting do not exonerate the drawer, unless by unreasonable delay he suffers loss, and then he would be entitled to relief, *pro tanto;* but what would be unreasonable delay is not defined.

3. Within what time the receiver of a check is bound to present it, in order to hold the drawer responsible, is a question of law. *Cawein* v. *Browinski*, 6 Bush, 457.

4. Check on a bank is payable on demand, requires no acceptance or notice of dishonor, implies that the fund drawn on is in bank or should be when presented, and not be withdrawn before presentment. The check transfers to the drawee or holder the exclusive right to the fund. *Smith & Campbell* v. *Jones*, 2 Bush, 103.

BANKRUPTCY.

1. See ASSIGNMENTS UNDER THE ACT OF 1856.

2. State legislatures have power to pass bankrupt or insolvent laws not conflicting with the act of Congress. (Ogden v. Saunders, 12 Wheat. 273; Boyle v. Zacharie, 6 Peters, 348; Baldwin v. Hale, 1 Wallace, 223.) *Ebersole & McCarty* v. *Adams, &c.*, 10 Bush, 83.

3. The act of 1856 does not conflict with the bankrupt law of Congress, and is not superseded or repealed by it. *Ibid*, 83.

4. The bankrupt act of 1867 dissolves attachments against the bankrupt's estate made within four months, sued out in the State courts as well as Federal courts. *Bank of Columbia* v. *Overstreet, &c.*, 10 Bush, 148.

5. All constitutional laws of Congress are binding on State as well as Federal courts, and all rights under them must be respected. *Ibid*, 148.

6. The dissolution of attachments in State courts, by operation of the bankrupt act, in no sense impairs the obligation of a contract, the attachment lien being secured by legal diligence and not by contract. Nor, where the right to attach was acquired after the bankrupt law went into effect, was any vested right divested. *Ibid*, 148.

7. A claimant of attached property may assert his claim, as provided by sec. 257 of the Civil Code; and, having acquired title, may recover the property on showing the attachment to be invalid, or that it has been dissolved by operation of law. *Ibid*, 148.

8. A State court can neither annul nor disregard a discharge granted by a court of bankruptcy, for any cause that would authorize such court to set it aside. *Thurnond* v. *Andrews and wife*, 10 Bush, 400.

9. Assignee in bankruptcy has no judicial powers. In a sale of the bankrupt's estate, he concludes the rights of those only whose claims are proved. *Second National Bank of Louisville* v. *National State Bank of New Jersey*, 10 Bush, 367.

10. Bankrupt courts, when called on, are empowered to ascertain and liquidate all liens on the bankrupt's property, and may

compel parties holding liens to submit them to its adjudication. *Ibid*, 367.

11. Assignee in bankruptcy may release to a secured creditor the bankrupt's right of redemption, or sell the property subject to such creditor's claim; or he may require the creditor to establish the validity of his debt, and have the property sold by judgment of the court. *Ibid*, 367.

12. Assignee may abandon all claims to encumbered property, when its value is not more than sufficient to pay the liens on it. *Ibid*, 367.

13. State courts have jurisdiction to subject such abandoned property to the creditor's claim, as though no bankrupt proceedings had ever been instituted. (Payne & Bro. v. Able, 7 Bush, 344; Stoddard v. Locke, 43 Vt., 374.) *Ibid*, 367.

14. A discharge in bankruptcy releases the bankrupt from all prior debts, and may be pleaded in bar of an action on such debts; and the certificate is conclusive evidence of the fact and of the regularity of the discharge. *Thurmond* v. *Andrews and wife*, 10 Bush, 400.

15. Failure to make publication and notify creditors (sec. 11, of the bankrupt act), will not affect the jurisdiction of the bankrupt court. *Ibid*, 400.

16. All creditors, whether notified or not, are concluded by the discharge, unless they assail, and have it annulled within two years. *Ibid*, 400.

17. Discharge in bankruptcy does not release the bankrupt from his fiduciary obligations. *Carlin's adm'r* v. *Carlin, &c.*, 8 Bush, 141.

18. Assignment in bankruptcy passes to assignee the debtor's title to all his property. The State and Federal courts have concurrent jurisdiction; assignee may sue in either court for the recovery and possession of bankrupt's property, and the creditors are not necessary parties. *Boone, assignee, &c.* v. *Hall, &c.*, 7 Bush, 66; *Shackleford, assignee, &c.* v. *Collier, &c.*, 6 Bush, 149.

19. The mortgagor, ten days after execution of mortgage, filed his petition in bankruptcy. The mortgagees were parties to the proceedings in the Federal court, and failed to assert title under the mortgage. The assignee sold the land, and the

sale was confirmed. *Held*—that the mortgagees cannot maintain suit to recover the mortgaged property, in the State courts. *Whipps, &c.* v. *Ellis, &c.*, 7 Bush, 268.

20. Sureties in attachment bonds are released by discharge of principal in bankruptcy, before any judgment was rendered against him; but the discharge of one partner does not release the other from the indebtedness of the firm; and the discharge does not prevent creditors from enforcing liens acquired by suits in the State courts upon property fraudulently conveyed to other persons. *Payne & Bro.* v. *Able, &c.*, 7 Bush, 344.

21. The omission of a creditor's name in the schedule of creditors, is not made a ground of avoiding bankrupt's discharge. To avoid the discharge on that ground, it must be shown that the omission was willfully and fraudulently made. *Payne & Bro.* v. *Able, &c.*, 7 Bush, 344.

22. Creditor, by proving his claim, waives all right of action against bankrupt on such claim. The bank proved its entire claim against the bankrupt, without giving credit for amount of his deposit. The assignee has a right to recover the deposit, and the bank cannot, after proving its claim, use the same or any part of it as a set-off against the suit of the assignee. *Brown, assignee, &c.* v. *Farmers' Bank of Ky.*, 6 Bush, 198.

BASTARDY.

1. Mother of a child born in slavery is entitled to its services during infancy, the putative father refusing to comply with the act of Feb. 14, 1866 (Myers' Sup., 734), and having married another woman. The children of such persons occupy the legal position of bastards. *Allen* v. *Allen*, 8 Bush, 490.

2. The act of June 3, 1865 (Myers' Sup., 62), provides for an appeal from the county court to the court of appeals by the adjudged father alone. *Commonwealth for Scott* v. *Kendall, &c.*, 6 Bush, 94. See now sec. 12, chap. 7, *Gen. Stat.*, 163.

3. A prosecution for bastardy cannot be dismissed by the mother. *Commonwealth* v. *Davis*, 6 Bush, 295.

4. In the absence of evidence to the contrary, a child *eo nomine* is legitimate; and the presumption of legitimacy is not repelled by mere balance of probabilities. Marriage and sub-

sequent recognition legitimates a child born before marriage, by the laws of Ky. *Dannelli, &c.* v. *Dannelli's adm'r*, 4 Bush, 51.

5. Bastardy proceedings are civil, not criminal; and an unmarried negro woman may make the affidavit against a negro man, nor is it necessary to show that she is unmarried; if the evidence shows it, that is sufficient. *Francis* v. *Commonwealth*, 3 Bush, 4. (Chap. 7, Gen. Stat., 160; Myers' Sup., 735.)

6. After the order granting change of venue in bastardy case has been made, the defendant is entitled to a continuance, to have an opportunity of filing the order thirty days before the next term of the court. *Riggen* v. *Commonwealth*, 3 Bush, 493.

7. The forfeiture of the bond for defendant's non-appearance should be set aside, where defendant appeared next day and showed reasonable excuse for non-appearance. *Same*, 493.

8. The amendment of March 1, 1860, to sec. 20, Civil Code, giving circuit courts appellate jurisdiction of the judgments and final orders of county courts in cases of bastardy, is not repealed by sec. 12, act of June 3, 1865. (Myers' Sup., 65.) *Lewis* v. *Commonwealth*, 3 Bush, 539.

9. Bastardy proceedings are not authorized, where all the parties were slaves at the birth of the child. *Same*, 539.

BELLIGERENT RIGHTS.

1. War does not destroy but only suspends the remedies of belligerent parties; and when it ceases, a party may maintain an action for the use of his real estate against one who held possession during and after the war, through the form of a purchase under an illegal judgment. The measure of recovery is what the use of the property was reasonably worth. *Louisville and Nashville R. R. Co.* v. *Buckner*, 8 Bush, 277.

2. Taking half-tanned leather by a party belonging to the Confederate army cannot be justified on the ground of necessity, unless the necessity was of an urgent character and would not admit of delay; and cannot be justified by an unlawful order or command. *Dills* v. *Hatcher*, 6 Bush, 606; 2 Bush, 453; 3 Bush, 202; 1 Bush, 66.

3. By appointing a provisional government for Kentucky, the Confederate Government precluded itself and officers from re-

garding Kentucky as enemies' country, or treating her non-combatants as enemies; and a Confederate soldier who took a mule belonging to a citizen of Kentucky serving in the Federal army, is liable for its value. The right of impressment is confined within very narrow limits. *Ferguson* v. *Loar*, 5 Bush, 689; 2 Bush, 460; 3 Bush, 203.

4. The right of impressment and of exacting military contributions must come from the commander of a district of country, or a post, or an army; and even then it may be shown that he only belongs to an irregular plundering service. *Lewis* v. *McGuire*, 3 Bush, 202; 2 Bush, 453.

5. Commercial contracts made between citizens of antagonist belligerent governments are void, if made during the war. Pre-existing contracts, such as partnership and insurance, are dissolved by the war; but the civil remedy on contracts made before the war are suspended thereby. The act of Congress of July 13, 1861, authorized the President of the United States to issue a proclamation to interdict all commercial intercourse between citizens of the then belligerent States; and before he did so, contracts and other commercial intercourse were not made illegal. *Leathers* v. *Commercial Ins. Co.*, 2 Bush, 296.

6. A mortgage executed during the war by a citizen of Tennessee to a citizen of Kentucky, was void. *Hyatt* v. *James' adm'r*, 2 Bush, 463.

7. The note was executed May 26, 1862, and a mortgage executed December 2, 1862, to secure its payment. It recites that at its date James was a citizen of Memphis and Hyatt a citizen of Louisville. These recitals do not show where they were citizens on May 26, 1862. The mortgage was void. The note, without other evidence, was good. *Hyatt* v. *James' adm'r*, 2 Bush, 463.

8. The circulation of Confederate money within the Confederate military lines extending over a part of the territory of Kentucky, by citizens of the State residing within said lines, was not illegal. *Same*, 463.

9. The national law regulated belligerent rights, which the State of Kentucky could neither modify, control, nor frustrate. *Price* v. *Poynter*, 1 Bush, 387; *Bell* v. *Louisville and Nashv. R. R. Co.*, 1 Bush, 404.

10. Capture of horses for the public use of the Confederate army, under military authority express or implied, excusable. *Same*, 387. And when either the capture or destruction of property by one belligerent is lawful, it is equally lawful for the other. *Bell* v. *Louisville and Nashville R. R. Co.*, 1 Bush, 404. A party acting under the orders of a Confederate general burned the cars of said R. R. Co., at Cave City, in May, 1862; *Held*—not liable in a civil action for damages. *Same*, 404.

11. However spurious the *de facto* government may be if under military cover, it suspended, within its potential range, the government and laws of Kentucky, and thereby legalized submission to its power. *Baker* v. *Wright, &c.*, 1 Bush, 500.

BETTING AND GAMING.

1. Permitting games of cards in a coffee-house for treats of liquor and cigars, is a violation of the statute. (Marston v. Commonwealth, 18 B. Mon., 491.) *Stahel* v. *Commonwealth*, 7 Bush, 387.

2. What indictment for setting up and keeping keno tables must aver. *Commonwealth* v. *Monarch*, 6 Bush, 298.

3. For setting up and keeping faro bank, what indictment must aver. *Commonwealth* v. *Monarch*, 6 Bush, 301.

4. Throwing dice, to determine who should pay for whisky or treats, is gaming within the statutes against permitting gaming, etc. *McDaniel* v. *Commonwealth*, 6 Bush, 326.

5. The court judicially knows that treasury notes lost at faro were not equivalent to money; and judgment in such cases should only be for treble the value of the treasury notes. *Perrit* v. *Crouch and The Commonwealth*, 5 Bush, 199. The act of March 2, 1860 (Myers' Sup., 434), did not repeal or modify sec. 4, chap. 42, Rev. Stat. (1 Stanton, 563); and joinder of relator's name and the Commonwealth was proper. *Same*, 196.

6. An indictment contains all of the essential averments to show that the statute has been violated—which charges that the defendant was the owner, occupier, and controller of a house and ten-pin alley, at which games were played and money lost and won by his permission; and that he and others played at such

games, and money and other valuable things were bet, lost, and won thereon. *Commonwealth* v. *Fraize*, 5 Bush, 325. (Rev. Stat., secs. 6 and 7, chap. 42 ; now Gen. Stat., chap. 47, p. 495.)

7. Keeper of billiard table liable to be indicted for suffering a minor, without permission of his parent or guardian, to play any game thereon, either by betting or not betting. The act of Feb. 22, 1864 (Myers' Sup., 247), is not repealed by section 8 of the act of March 6, 1868; the latter act does not embrace tables for private use, or the act of playing on public tables by minors without authority. *Green* v. *Commonwealth*, 5 Bush, 327.

8. Money loaned, to be bet on a horse-race, cannot be recovered. (Sec. 1, art. 1, chap. 47, Gen. Stat., 495.) *Alfriend, &c.* v. *Hughes*, 4 Bush, 40.

9. For a case not within said section, see Hieronimus v. Harris, 14 B. Mon., 313; and for a case embraced by it, see Brittain v. Duling, 15 B. Mon., 141. Also Connor v. Ragland, 15 B. Mon., 636.

10. Selling property to be paid for when Bell, &c., should carry electoral vote of Kentucky, is a bet on an election; and the court will not enforce the express contract, nor imply one that can be enforced. *Todd* v. *Caplinger*, 4 Bush, 139. And when the loser receives the thing bet, it is not forfeited to the Commonwealth. *Same*, 139.

11. An indictment charging "a game of chance called pigeon-hole," played for "greenbacks" in defendant's house, imports a violation of law. *Commonwealth* v. *Branham*, 3 Bush, 1.

12. During pendency of suit for divorce and alimony against an absconding husband, the wife, to the amount of alimony adjudged to her, has the right to make other persons, who have won money from her husband, parties, and recover it from them. *Cain* v. *McHarry*, 2 Bush, 263.

13. If any person shall lose, at one time, or within twenty-four hours, $5 or more, or property or other thing of that value, and shall pay, transfer, or deliver the same, the loser or any creditor of his may recover the value from the winner or any transferee of the winner. (Sec. 2, art. 1, Gen. Stat., 496.) Money lost at a subsequent time cannot be set off against what was previously won by a creditor of one who first was loser. *Caldwell* v. *Caldwell, &c.*, 2 Bush, 446. But a former judgment

recovered or compromised, and payments made in good faith, will bar subsequent action for the same cause of action to extent of such payments. *Same*, 446.

14. City court having jurisdiction to try all misdemeanors occurring in the city, when the punishment does not exceed $500 and one year's imprisonment or both, has no jurisdiction to try persons for setting up faro bank, gaming tables, &c., where the punishment is fine, imprisonment, and deprivation of right of suffrage, &c. *Flynn & Atkinson* v. *Commonwealth*, 2 Bush, 590.

BIGAMY.

1. The charge that the accused, having a wife living at the time, unlawfully married a certain woman, contains facts sufficient to constitute the offense of bigamy. *Commonwealth* v. *Whaley*, 6 Bush, 266.

2. No marriage, solemnized before any person professing to have authority therefor, shall be invalidated for the want of such authority, if it is consummated with the belief of the parties, or either of them, that he had authority, and that they have been lawfully married. (Sec. 7, art. 1, chap. 52, Gen. Stat., 515.) *Robinson* (*of color*) v. *Commonwealth*, 6 Bush, 309.

BILLIARD TABLE.

See BETTING AND GAMING.

BILLS OF EXCEPTIONS.

1. See CRIMINAL LAWS AND PROCEEDINGS.

2. The statement in a bill of exceptions of the testimony of the deceased witness on the former trial is not admissible in a criminal prosecution, being in violation of the constitutional right of the accused to meet the witness face to face. (Kentucky Constitution, sec. 12, art. 13.) *Kean* v. *Commonwealth*, 10 Bush, 190.

3. The substance of the testimony of a deceased witness may be proved by persons who were present at the former trial, and heard his statements, if they can remember the substance of all his testimony. *Ibid*, 190.

4. But evidence in a bill of exceptions may be read in a civil action when the witness is dead, and a re-trial has been ordered. *Ibid*, 190.

5. The time for filing a bill of exceptions is reckoned from the overruling of the motion for a new trial; the court cannot prescribe the time. *Harper* v. *Harper*, 10 Bush, 447.

6. What answer was expected from the witness must appear in the bill of exceptions, in order to show that the court erred in not permitting it. *Chrystal* v. *Commonwealth*, 9 Bush, 669.

7. Time to file bill of exceptions must fix certain day of next term to file it; and if not filed on the day fixed, and no order made extending the time, the paper purporting to be a bill of exceptions, being filed by order of court after the time fixed, will be unauthorized. *Smith, &c.* v. *Blakeman*, 8 Bush, 476.

8. Bill of exceptions is sufficient when it shows that it contains all of the evidence, and that grounds were filed for a new trial, and overruled. *Wing, &c.* v. *Dugan*, 8 Bush, 583.

9. Instructions not objected to when offered by the attorney for the Commonwealth, cannot be passed upon by the court of appeals. *Edgerton* v. *Commonwealth*, 7 Bush, 142.

10. Exceptions must be taken at the proper time. *Helburn & Co.* v. *Mofford*, 7 Bush, 169.

11. No paper is a part of the record, unless made so by order of court or bill of exceptions. Paper offered to be filed, if rejected, is no part of the record unless order rejecting it be excepted to. *Young, McDowell & Co.* v. *Bennett, &c.*, 7 Bush, 474.

12. When the evidence is not in the record, the court of appeals will presume it was such as to sustain the action of the court. *Reed* v. *Commonwealth*, 7 Bush, 641.

13. Objections to the bill of exceptions in the Jefferson court of common pleas, because not filed within sixty days after judgment, is regarded as having been waived in the court below. *Downing* v. *Bacon, &c.*, 7 Bush, 680.

14. Judgment rendered by the Jefferson court of common pleas, June 8, 1868. Time extended to file bill of exceptions, from time to time, till 19th Sept., 1868; but it was not filed until 26th Sept., 1868. Not in proper time. *Bailey* v. *Villier*, 6 Bush, 27; 17 B. Mon., 609; 1 Bush, 104.

15. Bill of exceptions is sufficient if it shows that it contains all of the evidence, although it does not say so. *Bracken Co. Court* v. *Robertson Co. Court*, 6 Bush, 69.

16. Omissions and failures to enter orders of court cannot be supplied by orders made at subsequent terms, on the memory of the judge; and a bill of exceptions filed *nunc pro tunc*, based on the memory of the judge, must be disregarded. *Lynch* v. *Reynolds*, 6 Bush, 547. And if bill of exceptions is filed at a subsequent term, without order of previous term authorizing it, it will be disregarded. *Same*, 547.

17. Document styled a bill of exceptions, but not signed or filed in court, cannot be noticed by the court of appeals. *Corley's ex'r* v. *Evans and wife*, 4 Bush, 409. Time being allowed to complete a bill of exceptions in vacation, the presumption is that it was signed out of court, and is therefore void. *Same*, 409.

18. In the absence of proof to the contrary, the court of appeals must presume the judgment of the circuit court to be right. *Same*, 409.

19. If time be given until the first day of the next succeeding term to file bill of exceptions, and the day passes without any notice being taken of the subject, it will be too late to file it at a subsequent day. *Meadows* v. *Campbell*, 1 Bush, 104.

20. Depositions improperly rejected by the court below, can be brought before the court of appeals by bill of exceptions only; which must show—the exceptions to the depositions, the rulings of the court and exceptions thereto, the depositions made part of the bill of exceptions, and all be certified by the presiding judge. *Walrath* v. *Viley*, 1 Bush, 266.

BILLS OF EXCHANGE AND NOTES.

1. In order that a bill or note may be negotiable, it must be for a sum definite and certain; and must not be connected with

any indefinite or uncertain sum. The reason for this rule of the law merchant is, that the paper is to become a substitute for money; and this it cannot be, unless it can be ascertained from it exactly how much money it represents. *Gaar, &c.* v. *Louisville Banking Co.*, 11 Bush (April 20, 1875, and Sept. 9, 1875).

2. When a bill of exchange is past due, it ceases to be negotiable, or to perform the office of money; and hence an obligation indorsed upon it to pay a reasonable attorney's fee for the collection thereof if it be sued upon, or any other thing which only renders its amount uncertain after it has ceased to be a substitute for money, cannot prevent its becoming negotiable paper. *Gaar, &c.* v. *Louisville Banking Co.*, 11 Bush (April 20, 1875, and Sept. 9, 1875).

3. When the holder of a bill indorses his name upon it and delivers it, such indorsement and delivery pass the title; and the holder, when he sues and alleges title in himself, is entitled to recover, unless his title is denied by plea—when it may become necessary to fill up the indorsements, in order to furnish evidence to overcome the denial. (Cope v. Daniel, 9 Dana, 415.) *Gaar, &c.* v. *Louisville Banking Co.*, 11 Bush (Sept. 9, 1875).

4. An agreement between the holder of a bill and any indorser, that the latter shall not be held bound, is not to the prejudice of any prior indorser; hence, such agreement is no defense to an action upon the bill against all who are previously bound. *Gaar, &c.* v. *Louisville Banking Co.*, 11 Bush (April 20, 1875).

5. The renewal of a note by the same parties does not affect a pledge made to secure it. *Bank of America* v. *McNeil*, 10 Bush, 54.

6. The statute authorizing assignment of notes does not give them any negotiable qualities, but merely gives the assignee the legal title and a remedy at law. *Prather, &c.* v. *Weissiger, &c.*, 10 Bush, 117.

7. An assignee of a promissory note, acquiring title without notice of any existing equity, becomes the absolute owner, subject to defenses acquired by the maker before notice of the

assignment. Such notes have never been treated, in this State, as commercial paper. *Ibid*, 117.

8. If an assigned note is lost or stolen, whether with the owner's name indorsed or not, he can, after demand and refusal of the finder, or even of a purchaser from the latter in good faith, maintain an action for its recovery or for damages for its conversion. *Ibid*, 117.

9. A promissory note, not capable of being discounted at the bank where payable, though transferred by assignment to an incorporated bank, is not on a footing with bills of exchange. *Campbell's ex'r* v. *Farmers' Bank of Kentucky*, 10 Bush, 152.

10. Notes payable at private banks cannot be put on the footing of bills of exchange. *Ibid*, 152.

11. Only those promissory notes made negotiable and payable in an incorporated bank, are placed on the footing of bills of exchange. *Payne* v. *Bank of Bowling Green*, 10 Bush, 176.

12. Warehousemen's receipts are transferable by indorsement, with like effect and remedy as bills of exchange. (Act of 1869.) *Greenbaum Bros. & Co.* v. *Megibben*, 10 Bush, 419.

13. Alteration of the general acceptance of a bill of exchange renders it void as to all parties not consenting to the alteration. (Burchfield v. Moore, 3 Ellis & Bl., 683; 25 Eng. Law and Eq. Rep., 123; Oakey v. Wilcox, 3 How. Miss., 330; 2 Parsons on Notes and Bills, 548.) *Whitesides* v. *Northern Bank of Kentucky*, 10 Bush, 501.

14. The answer of an indorser in an action on the bill, setting up an alteration, need not aver that he did not ratify the alteration, and on demurrer to the answer no inference unfavorable to the indorser can be drawn from the fact that the acceptor is making no defense in the action. *Whitesides* v. *Northern Bank of Kentucky*, 10 Bush, 501.

15. Alteration of the figures in the margin of a bill of exchange, making them conform to the body of the instrument, will not vitiate the bill. But if the amount of the bill is indicated only by the figures in the margin, an alteration will vitiate the bill. Parol evidence is not admissible to show that the sum intended was that stated in the margin, instead of that in the body. (Smith v. Smith, 1 R. I., 398; Henderson v. Bondurant,

39 Mo.; 1 Parsons on Bills, 28.) *Woolfolk* v. *Bank of America*, 10 Bush, 504.

16. A *bona fide* indorsee of a negotiable note, indorsed before due, for value, without notice of facts impeaching its validity, holds it unaffected by such facts, and may recover—although as between antecedent parties the note be invalid. (Swift v. Tyson, 16 Peters, 1; Goodman v. Simonds, 20 How., 367.) *Ibid*, 504.

17. The title of the holder of a bill for value is not defeated by proof of his negligence in taking it. (2 Parsons on Bills and Notes, 279.) *Ibid*, 504.

18. Defects on the face of a bill put the party taking it on inquiry; or he must abide the loss, if it appear that the bill was changed without the consent of the parties to it. Whether such defects appear on the face of the bill, is more a question of law than fact. *Ibid*, 504.

19. Any alteration in the material part of a bill, without consent of the parties, renders it invalid, even in the hands of an innocent holder. (Chitty on Bills, 100; 2 Parsons on Bills, 580.) *Ibid*, 504.

20. The party signing a blank note for accommodation must suffer the loss rather than an innocent holder. *Woolfolk* v. *Bank of America*, 10 Bush, 504.

21. A party seeking to escape liability must allege and prove a knowledge, on the part of the holder, of the facts constituting the fraud. *Ibid*, 504.

22. Surrender of note raises presumption of payment. *Wells' adm'r* v. *Robb*, 9 Bush, 26.

23. D. as principal and Y. as surety executed, on Sunday, two notes to C., for money loaned; the contract for the loan was made on that day, and part of the money was paid to D., and a check given for the remainder on that day—which was collected by D.'s son on the Wednesday following; afterwards D. received a discharge in bankruptcy. In a suit on the notes it was *held*, that the collection of the check was an affirmance of the notes. It further appearing that Y. took an active part in getting the money for D., and informed C. at the time that most of the money to pay him would be realized through Y., being money owing to D. by Y. as administrator, and that Y. failed to disaffirm the contract, but acquiesced in the collection of the check,

and the retaining of the money gotten on Sunday, it was *held*, that Y. was bound by the affirmance. *Campbell* v. *Young*, 9 Bush, 240.

24. When the residence of the parties is known to the notary, it is his duty, under the act of January 16, 1864, to give or send the notices to such parties as are sought to be made liable. When the residence of such parties is in the same town or city in which the protest is made, and known to the notary, a notice should be delivered in person by the notary, or left at the dwelling or business house of the party sought to be charged, on the day of dishonor of the paper, or before the expiration of the business hours of the succeeding day. *Neal & Co.* v. *Taylor*, 9 Bush, 380.

25. A partial payment on a note, made before a bar by limitation, is *prima facie* an acknowledgment that the residue is unpaid, and of a continuing liability therefor; and suspends the operation of the statute, between the accrual of the cause of action on the note, and the date of that payment. *English* v. *Wathen*, 9 Bush, 387.

26. If the individual note of one partner is accepted as a merger of a partnership liability, the other partner is thereby exonerated from any legal responsibility for the debt, whatever his liability may at first have been. But if the individual note of one partner was given and accepted not merely as the note of that partner, but was meant and intended as an obligation for and on behalf of the firm, its acceptance did not exonerate the other partner from responsibility. *Smith* v. *Turner's adm'r*, 9 Bush, 417.

27. "Presentation and protest waived," inserted in the body of the bill, forms a part of the contract of the indorser as well as drawer. *Bryant* v. *Merchants' Bank of Ky.*, 8 Bush, 43.

28. Notice of the dishonor of the paper sought to be held liable should be given or sent by the notary, when he knows their place of residence. *Mulholland & Bro.* v. *Samuels*, 8 Bush, 63. He is competent to prove that he did not at the time of protest know the places of residence of the parties to the bill; and he is not required to use ordinary diligence to ascertain the places of their residence. *Same*, 63.

29. A note executed and payable in Louisiana was indorsed by the payee, and discounted before maturity in a bank in Kentucky. Although indorser knew that, by the law of Louisiana, its character was that of a bill of exchange, the legal effect of the indorsement must be determined by the laws of Kentucky. *Hyatt* v. *Bank of Ky.*, 8 Bush, 193.

30. "If not paid, I request indulgence," indorsed by an obligor on it, at or about the time the note was executed, was no such continued request as would estop the obligor from pleading the statute. *Carr's ex'r* v. *Robinson & Dudley*, 8 Bush, 269.

31. A promise to pay a note, *after* fifteen years have elapsed from its maturity, constitutes a new cause of action; but if the promise is made during the fifteen years, it lengthens the validity of the paper, and the statute commences to run from the date of the promise. In the former case, suit must be upon the new promise, and in the latter upon the note. *Carr's ex'r* v. *Robinson & Dudley*, 8 Bush, 269; also, 6 Bush, 365. When an obligation is silent as to the time interest is to commence running, the law implies that it is to bear interest from the time it becomes payable; and payments of interest by mistake, when none was due, are applied as payments on the principal debt at the date of the maturity of the obligation. *Same*, 269.

32. A check is an appropriation of so much money to the holder, in the hands of the banker, to remain there until called for; after notice, it cannot be withdrawn by the drawer, and the holder holds it free from all equities, although taken several days after date, as it is treated as never overdue, being payable on presentation and demand. *Lester & Co.* v. *Green, Jones & Co.*, 8 Bush, 357. (Buckner, &c. v. Sayre, 18 B. Mon., 745.)

33. The law of another State must be pleaded as a fact, with sufficient distinctness for the court to judge of what is the effect of the law; and the plaintiff having failed to so plead it, the court did not regard it; and the defendant having relied upon a failure of consideration, the case was properly decided by the laws of Kentucky, although the note was executed in Ohio and made payable in Illinois. *Roots* v. *Merriwether*, 8 Bush, 397. The court would not permit either the statutes of Illinois or Breese's Illinois Reports to be read as evidence in the case.

But did permit depositions, taken in a former suit between same parties and about same matters in controversy, to be read, without proving death of witness or absence from the State. (2 Mar., 525; 1 Greenleaf on Evidence, sec. 553.)

34. Bill of exchange—left blank as to date, amount, and address—when filled up for any amount by the party for whose benefit the bill is made, and discounted by an innocent purchaser for money or in payment of a pre-existing debt, may be collected by him, although it be filled for more than agreed upon by the original parties to the bill; and if accepted by the parties to whom addressed, the writing of another name also across the face of the paper as acceptor, with the knowledge of the party discounting it, will not vitiate it. *Smith, &c.* v. *Lockridge*, 8 Bush, 423.

35. Waiver of right to notice, contained in the bill, dispenses with proof of notice of dishonor. *Same*, 423.

36. For alteration of bill or note, see title ALTERATION OF WRITING. Also, *Elbert* v. *McClelland, &c.*, 8 Bush, 577.

37. Person not a party to a promissory note, by signing his name across the back of it becomes a guarantor, and authorizes the holder to fill up the blank with words of guaranty. (Act Jan. 24, 1866, Myers' Sup., 741.) *Arnold* v. *Bryant*, 8 Bush, 668. (Gen. Stat., 251.)

38. Promissory note payable to maker's order good; and certain promissory notes placed on the footing of bills of exchange. (Gen. Stat., 251, 252.)

39. If the indorser's name follows that of the payee, the presumption is that he was assignee of payee; but this presumption may be rebutted by parol. *Arnold* v. *Bryant*, 8 Bush, 668.

40. For duties of notary public in protesting bill of exchange, and how far the signature or seal of the notary is to be received as evidence, see Gen. Stat., chap. 79, page 677.

41. If the holder intends to hold any or all of the indorsers responsible to him, he must notify them of the dishonor of the bill; and where the party to be charged resides in the same city or town where the bill is presented and demand made, notice must be personal, or left at his dwelling-house or place of business. *Todd* v. *Edwards*, 7 Bush, 89. If the notary sends the notice to the holder of the bill by mail at another place, to be

by him remailed and sent to the indorser at the place of demand and protest, it will be insufficient. *Same*, 89.

42. In Ohio, a note operates as a bill of exchange, and punctual presentation, protest, and notice are required to fix the liability of the indorsers. *Wallenstein* v. *Seligman & Co.*, 7 Bush, 175.

43. The right of action in favor of the indorser, against those bound with or before him, accrues only upon the payment of the bill by him. *Bowman* v. *Wright*, 7 Bush, 375.

44. Limitation runs against the indorser from the day of payment by him; and his indebtedness to the drawer may be pleaded as a set-off by the acceptor, in an action against him by the indorser. *Same*, 375.

45. Bill of exchange drawn in Louisville, Ky., and payable in Smithland, Ky., was a domestic bill, and notice of dishonor thereof indispensable. *Young, McDowell & Co.* v. *Bennett, &c.*, 7 Bush, 474. Whether or not the protest of a domestic bill be material, yet if it is done, and notice of the protest gives the holder notice of its dishonor, he is bound by it. *Same*, 474.

46. Acceptance of a draft from the factor by the consignor, which was protested and returned without laches on the part of the consignor, did not extinguish the pre-existing liability of the factor. *Cartmell & Drury* v. *Allard*, 7 Bush, 482. The flour consigned to the factor at Memphis from Paducah, Ky., was sold and money placed to credit of the factor, who purchased draft on New York, and sent it to the consignor. It was protested for non-payment, and the factor held liable. *Same*, 7 Bush, 482.

47. "Payable to order" makes a note negotiable. *McCormack* v. *Clarkson, &c.*, 7 Bush, 519. (See sec. 10, chap 22, Gen. Stat., 248; Myers' Sup., 60.)

48. An acknowledgment of, or promise to pay, a debt before it is barred by time, does not supplant the subsisting cause of action, but prolongs the statutory limitation by cutting off the antecedent time. *Hopkins, &c.* v. *Stout*, 6 Bush, 375. An indorsement on a note of a partial payment, in the lifetime of the obligor, and before it was barred by limitation, is competent evidence for the obligee that at its date the amount was paid, and that the residue remains unpaid. *Same*, 375.

49. Drawer is entitled to recover of indorser one-half of the amount of the bill which drawer was compelled to pay, they having executed it for the accommodation of the acceptor, with the agreement that each should pay one-half the bill if the acceptor failed to do so. *Edelen* v. *White*, 6 Bush, 408.

50. Presenting check for payment before close of banking hours next day after it is drawn, is sufficient to charge the drawer in case of non-payment. *Cawein* v. *Browinski*, 6 Bush, 457.

51. When a writing can be interpreted either as a bill of exchange or note, the person who receives it may treat it as either, and a misnomer of the writing in the petition is no cause of general demurrer. *Bradley* v. *Mason*, 6 Bush, 602.

52. Holder of a bill of exchange, payable at a certain time, is not bound to present it for acceptance, yet if he does so, and acceptance be refused, he is bound to notify such parties thereof as he intends to hold responsible. *Union National Bank* v. *Marr's adm'r*, 6 Bush, 614. To justify a failure to give such notice, it must be shown to have been morally or physically impossible to do so. *Same*, 614.

53. The drawer of a bill of exchange, drawn and accepted for his benefit, is liable to the acceptor for the amount paid thereon by him; but an accommodation drawer is not liable to an acceptor who has notice of the fact. When bills are drawn on letters of credit, to enable the drawer to purchase and ship produce, the presumption that the acceptor has funds of the drawer is rebutted. And when the acceptor knows that the drawer has merely loaned his name to give the bill credit, the former cannot look to the latter. *Turner, Wilson & Co.* v. *Browder*, 5 Bush, 216.

54. Acceptance given by one partner in payment of partnership debt, and judgment thereon, merge the original debt of the firm, and preclude a suit against the other members of the firm. *Nichols & Co.* v. *Burton, &c.*, 5 Bush, 320.

55. Possession of a negotiable note payable at a bank, with indorsements erased on it, rebuts all presumptions that the note was assigned for any other purpose than that of collection. To make the bank the agent of the payee, the paper must be indorsed to or deposited with it. Merely making it payable at

the bank, designates the place where the funds may on the day be found to pay it. *Caldwell* v. *Evans*, 5 Bush, 380.

56. Indorsers resident within the jurisdiction of one belligerent, of commercial paper which matures, is payable, and protested for non-payment in the jurisdiction of the other, whilst the war is flagrant, are entitled to notice of the protest at the earliest reasonable practicable moment after mail communications are re-established. And if not given the indorsers are exonerated. *Morgan, &c.* v. *Bank of Louisville*, 4 Bush, 82.

57. Promissory note made negotiable and payable at a bank in Ohio, passed in that State to a citizen of Kentucky, who indorsed it to another citizen of Kentucky. Indorsement was made and treated as an assignment. The law of Kentucky regulates the contract of indorsement, and the indorser is liable as assignor, and not as indorser of a bill of exchange. The assignor executed a mortgage stipulating that the obligors and assignor will pay the note at maturity; this mortgage is but a security that if the assignee fails, after due diligence, to get the amount of the note from the payor, then the mortgage would assure full payment by the assignor on his ultimate liability. *Carlisle, &c.* v. *Chambers*, 4 Bush, 268.

58. Notice of dishonor of a bill of exchange must be left at the indorser's place of abode or business, with a person of sufficient age or discretion to take care of it; and if not shown that there was such a person within the premises, leaving notice at the place is sufficient. *Bank of Ky.* v. *Duncan*, 4 Bush, 294.

59. Ordinarily, the relative rights and duties of parties to a bill of exchange are determined by their attitude on it; but these may be changed, by agreement between the parties. Where drawer and indorser each paid one-half of the bill, authorizes the inference that they agreed to do so by some previous arrangement. *Denton* v. *Lytle, &c.*, 4 Bush, 597.

60. If one of the parties to a bill of exchange negotiate it, with a forged indorsement and the name of the drawer also forged, he is estopped from denying the genuineness of the indorsement, or setting up forgery in defense of the action by the holder; and where the bill has been uttered by one of the partners and proceeds received by him in the firm name, each partner is liable to the bank for the amount of the bill—the

officers of the bank having no knowledge of the forgeries when the bill was purchased and money paid. *Burgess* v. *Northern Bank of Ky.*, 4 Bush, 600.

61. An accommodation drawer may recover from acceptor and indorser any amount he may have paid on the bill for their use; and as between themselves, their true condition may be shown by proof *aliunde*. *Lewis* v. *Williams*, 4 Bush, 678.

62. If a bill of exchange is received *bona fide* in discharge of an existing demand, whether the person passing it was acting rightfully or not, the plaintiff, having received it innocently in the regular course of business for a valuable consideration, will be protected. The correct test, as to whether received in payment of a debt or as collateral security, is to ascertain if the party receiving it has precluded himself from recovering a judgment as to so much of his original debt as the bill amounts to; and if he has not, he is not protected against the infirmities of the bill. *May* v. *Quimby & Co.*, 3 Bush, 96.

63. The indorsement of a bill for the accommodation of the drawer and acceptor, carries with it an implied authority that they may appoint a place of payment, if none is fixed on the face of the bill. So much of the *argument* as is inconsistent with the foregoing, contained in the case of *Rogers, &c.* v. *Poston*, 1 Met., 643, is disapproved. *Todd* v. *Bank of Ky.*, 3 Bush, 626.

64. See BANK CHECKS. *Smith & Campbell* v. *Jones*, 2 Bush, 103. Also, BANKS.

65. Order drawn by J. on C., in favor of H., is a bill of exchange. *Hunter* v. *Cobb*, 1 Bush, 239.

66. H. obtained money on a bill on which D. was indorser; who loaned H. the money to pay it off, and took a mortgage to secure the loan—which was in contemplation of insolvency, but not within the act of March 10, 1856. *Davis* v. *Gardiner & Co.*, 1 Bush, 272. (1 Stanton's Rev. Stat., 553; Gen. Stat., 490.)

67. Acceptors, who hold property of drawer to pay bills or for reimbursement, are lien creditors; and if drawer dies, before said property is disposed of, insolvent, and after it is disposed of a balance should remain unpaid, such balance will be postponed until the other creditors receive from the residue of the estate the same proportion of their debts as the lien creditors realized

out of the property on which they held a lien. *Martin, Cobb & Co.* v. *Curd's adm'r*, 1 Bush, 327. (Sec. 34, art. 2, chap. 39, Gen. Stat., 451.)

BILLS OF LADING.

Property *in transitu* may be pledged by the delivery of bills of lading therefor; and a lien is created by such pledge and delivery. *Petitt & Co.* v. *First National Bank of Memphis*, 4 Bush, 334.

BILLS OF REVIEW.

Laches and negligence destroy the title to relief under a bill of review. A right to a new trial must be manifested. *Alexander* v. *Waller, &c.*, 11 Bush (April 9, 1875).

BONDED WAREHOUSE.

1. See WAREHOUSEMEN.

2. As to character or degree of diligence required in removing whisky stored in bonded warehouse, see *Macklin* v. *Frazier*, 9 Bush, 3.

3. An act of Congress forbids removal, under heavy penalty, of spirits from any place of storage, except between sunrise and sunset. In case of fire at night, which would inevitably result in destroying said spirits, it was the warehouseman's duty to remove same; and if he failed to do so he is liable to the owner for its loss. *Macklin* v. *Frazier*, 9 Bush, 3.

BONDS—STATUTORY, &c.

1. See EXECUTION; EXECUTORS AND ADMINISTRATORS; INJUNCTIONS (9 Bush, 745); PARTIES; REPLEVIN BONDS; and SUPERSEDEAS BONDS (9 Bush, 699).

2. A bond executed by a sheriff appointed to fill a vacancy occurring after the first Monday in January, but who had not

also been appointed collector of the revenue, is not a good statutory bond; and cannot be made the foundation of a judgment by motion. Such a sheriff is not *ex-officio* collector; but must first be appointed collector by the county court, and then give bond. *Basham, &c.* v. *Commonwealth*, 11 Bush (Nov. 18, 1875).

3. The return of the indemnifying bond to the circuit court, on the day succeeding the sale, ought to be regarded as legal diligence. *Rudy, &c.* v. *Johnson, &c.*, 11 Bush (Nov. 12, 1875).

4. To render judgment against the obligors in an indemnifying bond for a greater sum than was due on the execution was not error, in this case. *Secrets, &c.* v. *Markwell*, 11 Bush (Sept. 22, 1875).

5. Object and effect of indemnifying bonds discussed. *Secrets, &c.* v. *Markwell*, 11 Bush (Sept. 22, 1875).

6. In every case where an indemnifying bond is given, it is fair to conclude that if the bond had not been given the property would not have been seized and sold; and that, therefore, the wrong done results wholly from the act of those signing the bond. There is no hardship, then, in holding them to answer for all the consequences flowing from their own act. *Secrets, &c.* v. *Markwell*, 11 Bush (Sept. 22, 1875).

7. Action brought by a non-resident or corporation, without first giving bond for costs, shall be dismissed. But this right which the defendant has may be waived; and will be so held, if no steps are taken to enforce it before judgment. Defendant will not be allowed to raise the question, for the first time, in the court of appeals. *Shelly* v. *Newport Saving Association*, 11 Bush (Sept. 18, 1875).

8. A bail bond executed by a person charged with felony, before one magistrate only, is unauthorized and void, and should be quashed. *Murphy, &c.* v. *Commonwealth*, 11 Bush (June 9, 1875).

9. A corporation may maintain an action on the bond of one of its officers. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

10. The acceptance of a bond may be presumed from the acts of the parties. *Same*, 23.

11. Sureties in the bond are released because of the concealment of facts from them. *Same*, 23.

12. The legal presumption, where a bond bears no other date than "the —— day of ———, 1869," is, that it did not become binding on the bondsmen until the last day of that year. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

13. Where the sureties in the official bond of a bank cashier covenant that he will perform the duties of his position, and account for all moneys and other valuables that may pass through his hands, no failure of duty thereafter on the part of the directors short of actual fraud or bad faith can be deemed sufficient to exonerate them from its performance. *Same*, 23.

14. Every bond of a sheriff and sureties, that he will discharge a public duty, is an official bond. *Anderson, &c.* v. *Thompson, &c.*, 10 Bush, 132.

15. The surety in a supersedeas bond is liable to the surety in the replevin bond. *Kellar* v. *Williams*, 10 Bush, 216.

16. Refunding bonds cannot be required of devisees by an executor, after suits against him by creditors have been barred by lapse of time. *Grigsby's ex'r* v. *Wilkinson, &c.*, 9 Bush, 91.

17. A bail-bond is not rendered invalid because of the omission of the stipulation that, if the defendant failed to perform the conditions, the bail would pay to the Commonwealth the specified sum. *Commonwealth* v. *O'Daniel, &c.*, 9 Bush, 551.

18. A bond to keep the peace is not forfeited by drunkenness. *Rankin & Zahn* v. *Commonwealth*, 9 Bush, 553.

19. Where a guardian's bond was so defectively prepared and executed as to be invalid, the judge was responsible. *Kinnison* v. *Carpenter, &c.*, 9 Bush, 599.

20. Obligors in a bond to have the property forthcoming "to abide the further orders of the court," are held to have been bailees of the property named in the bond. *Bush, &c.* v. *Groom*, 9 Bush, 675.

21. Bond executed by sheriff in June, when the law required it to be executed in January or February, is not a statutory bond, and creates no lien on the estate of sheriff. *Hall, &c.* v. *Commonwealth, &c.*, 8 Bush, 378.

22. Constable's bond embraces such liabilities only as are incurred after the execution thereof; and sureties will be liable for money coming to constable's hands after the execution of the bond. *Boswell & Lemmon* v. *Sheriff*, 8 Bush, 97.

23. A bond suspending part of a judgment may be substituted for one, executed by mistake, suspending the entire judgment. *Ross, &c.* v. *Wilson, Peter & Co.*, 7 Bush, 29.

24. When anything in the form of a bond has been returned, the court should permit it to be perfected *nunc pro tunc*. *Hargis* v. *Pearce & Son*, 7 Bush, 234.

25. Signatures to a blank, with authority to the clerk to fill up the body for an appeal bond, which he fails to do, is not valid for any purpose. *Same*, 234.

26. Bond, in actions to recover personal property, inures to the benefit of another party who recovers it, though not a covenant in express terms to the party who recovers judgment. *McGlasson* v. *Bradford*, 7 Bush, 250.

27. Execution of appeal bond does not suspend judgment. To do so, a *supersedeas* must issue by the proper clerk. *Whitehead* v. *Boorom*, 7 Bush, 399.

28. Bond, under sec. 215, Civil Code, to perform judgment of the court, includes the costs of the action. *Galloway* v. *Bethune*, 6 Bush, 113.

29. If a bond is faulty, party may have it quashed upon notice within proper time; but recognizing its efficacy from 1861 to 1865, without taking steps to quash, comes too late after that time. A replevin bond is not vitiated as a statutory bond because not attested by the officer. *Prather* v. *Harlan and Thompson's adm'r*, 6 Bush, 185.

30. The defendant may demand an indemnifying bond, in an action on a lost note. *Berry* v. *Berry's ex'r*, 6 Bush, 594.

31. Recognizances of record in civil as well as criminal proceedings, when taken as security, are treated as valid at common law. (Hamilton v. Commonwealth, 3 Mon., 212; McClure v. McKee, 14 B. Mon., 263.) *Kinney, &c.* v. *O'Bannon's ex'r*, 6 Bush, 692.

32. A surety in a bond having the force of a replevin bond, executed to the clerk for money in litigation loaned by the order of court, is released, if the party to whom the money is adjudged does not issue execution thereon or proceed by rule within one year thereafter, notwithstanding the death of the principal. *Wintersmith* v. *Tabor*, 5 Bush, 105.

33. By direction of one of the parties to the suit, executions were issued in 1860, 1861, 1866, 1867, on a sale bond executed in 1858 before the commissioner of the Breathitt circuit court. Nothing appearing to show to whom the money was adjudged, or that the court had ordered the collection of the money, and because of the disturbed condition of the country by the war, and the suspension of the statute of limitations by the act of Feb. 20, 1864, it was improper to release the sureties. *Haddix, adm'r* v. *Chambers & Little*, 5 Bush, 171.

34. Subsec. 2, of sec. 440, Civil Code, prescribes the execution of a bond, in cases of attachment of property of defendants constructively summoned; but where there is a mere injunction, the ordinary injunction bond is sufficient. *Fellows, &c.* v. *Day*, 5 Bush, 666.

35. The bond of an administrator executed in 1847, in this State, is not void, because all the obligors were residents of Virginia. *Rutherford's heirs* v. *Clark's heirs*, 4 Bush, 27.

36. On motion for judgment on a bond suspending sale of property under execution, the notice should be considered in connection with the bond. *Smith* v. *Wells' adm'x*, 4 Bush, 92. And a judgment for ten per cent. damages thereon is erroneous, without ascertaining the amount. *Same*, 92.

37. In an action on an attachment bond, the expenses for defending the original action cannot be recovered; but only such as are incurred for the defense of the attachment. *Johnson* v. *Farmers' Bank of Ky.*, 4 Bush, 283.

38. When an execution is levied on partnership property to pay debt of one of the partners, and the sale is suspended by the execution of the bond under sec. 713, Civil Code, by the other partners, only the interest of the defendant in the execution, after settlement of the partnership accounts, can be sold. *Williams* v. *Smith*, 4 Bush, 540. And on motion on the bond, judgment must be given according to law and rules of equity. The case of Watson v. Gabby, 18 B. Mon., 660, is overruled. *Same*, 541.

39. A third party executing a forthcoming bond for property levied on, reciting that "it being the property of" the defendant, cannot, without proof of fraud or mistake, assert ownership and claim to such property by executing a claimant's bond, and

thereby prevent judgment against him on the forthcoming bond. *Sparks* v. *Shropshire*, 4 Bush, 550.

40. Plaintiff may sue on an appeal bond without issuing an execution; but when he issues an execution, the lien thereby acquired inures to the surety on the bond; and if discharged by plaintiff, it will exonerate the surety, and is a good defense in a suit on the appeal bond. *Dills* v. *Cecil*, 4 Bush, 579.

41. The county courts have power to require sheriffs, as often as deemed proper, to give additional sureties; and whether they sign the old or new bonds, makes the bonds signed by them official bonds as to such sureties. *Commonwealth* v. *Adams, &c.*, 3 Bush, 41.

42. Constable and his sureties are liable on his bond for tortious acts under color of his office; as for non-feasance and unintentional misfeasance; but for acts of violence, which are personal wrongs, the sureties are not liable. *Jewell* v. *Mills, &c.*, 3 Bush, 62.

43. A bond which contains no covenant to pay the claimant of property seized, etc., under a distress warrant, the damages sustained by such claimant in consequence of the seizure, etc., as prescribed by sec. 709, Civil Code, presents no bar to an action against the constable for the wrongful seizure of property, etc. *Jewell* v. *Mills, &c.*, 3 Bush, 62.

44. Marshal of Lawrenceburg having power to levy and collect an execution, in an action against him on his bond for failure to do his duty, it was not necessary to allege that he had power to levy, etc. *Bixler's adm'x* v. *Parker, &c.*, 3 Bush, 166.

45. On a bond executed *pendente lite* for property sold by the sheriff—payable to him "for such uses as may hereafter be adjudged by the court"—forbearance to have execution issued on the bond for the space of a year did not release the surety. The court could enforce the bond by rule or execution, but there was no creditor or plaintiff who could do so. *Barbee* v. *Pitman*, 3 Bush, 259.

46. A deputy executed bond with sureties to the sheriff to save the principal harmless from the consequences of the deputy's acts. The sheriff was subjected to liability and damages by suit on account of the default of the deputy. Statute of limitations did not begin to run against the sheriff's right of action on the

bond until the judgment was rendered against the sheriff; nor was his claim barred until seven years after the rendition of the judgment against him. *Bottom, &c.* v. *Williamson*, 3 Bush, 521.

47. Surety in a bond having the force and effect of a replevin bond, executed to a commissioner for money in litigation, loaned by order of court, is not released thereon by failure to issue execution for more than a year after the maturity of the bond. *Rankin* v. *White, &c.*, 3 Bush, 545.

48. One of three sureties in a guardian's bond moved for counter security, and was released by the county court by the guardian executing a new bond with two other sureties. The other sureties in the first bond were not released, and were held liable jointly with the sureties in the new bond. *Boyd* v. *Gault, &c.*, 3 Bush, 644.

49. An indemnifying bond to an officer under sec. 709, Civil Code, embraces all legal or equitable claimants whose rights may be put in jeopardy by the seizure and sale under the execution; and a right of action is given to all such claimants, by sec. 711, Civil Code. *Watts* v. *Cook, &c.*, 2 Bush, 141.

50. Assignment of title-bond, saying nothing about rents or when possession is to be given, is an equitable assignment of the rent due at the end of the year. *Epperson* v. *Blakemore*, 2 Bush, 241.

51. Clerk of circuit court is not liable on his bond for the loss of a debt which resulted by his mistake in omitting to enter judgment, unless the omission was caused by his gross negligence or fraud. *Commonwealth, &c.* v. *Thompson*, 2 Bush, 559.

52. Sheriff having warrant, who fails to arrest one under indictment, or having arrested accused willfully takes insufficient bail, is liable with his sureties on his official bond to a civil action at the suit of the Commonwealth. *Commonwealth* v. *Reed, &c.*, 2 Bush, 618.

53. A surety signed a bond, and it was agreed by obligors and obligees that before delivery, other persons were to sign it; but afterwards he agreed to its delivery without the other parties having signed it, and he was held liable. *Garvin & Co.* v. *Mobley, &c.*, 1 Bush, 48.

54. If an appeal-bond be defective, a new and sufficient one may be executed in such reasonable time as the court may fix. (Civil Code, sec. 753.) *Watters* v. *Patrick*, 1 Bush, 223.

55. Action against sheriff and sureties on his official bond, for failing to return an execution from another county, and for failing in part to pay over money collected thereon, is restricted to the county of which he is sheriff. *Bank of Ky.* v. *Harrison, &c.*, 1 Bush, 384.

56. A receiver appointed to collect debts, etc., was ruled to report. To get indulgence until the next term, he executed a new bond with sureties. Having failed and died, his sureties in the bond aforesaid were liable for the amount of the fund ascertained to be in his hands. The court had the power to secure the fund in any unprohibited way. *Rowlet, &c.* v. *Eubank, &c.*, 1 Bush, 477.

57. Bond executed in 1856, by a commissioner and receiver appointed by the court, although not provided for by statute, is good as a common law bond; and being directed by the court to sell property for cash, after making sale and delivery of the property, he is held liable for the amount of the sale. *Ellis* v. *Carr, guardian, &c.*, 1 Bush, 527.

BONDS FOR CONVEYANCE OF LAND.

1. See CONSIDERATION. *Peters, &c.* v. *Bourne, &c.*, 11 Bush (March 22, 1875).

2. When a bond for land is assigned, no lien exists for the unpaid purchase money which assignee agrees to pay, unless the unpaid purchase money is set forth in the assignment, or the lien is expressly retained therein. *Taylor* v. *Ford, &c.*, 1 Bush, 44.

3. Sale for Confederate money of land lying within Confederate lines, is binding and will be enforced. *Martin* v. *Hortin, &c.*, 1 Bush, 629.

BOUNDARY.

Center of a private street or public highway is the limit and boundary of lots or land sold abutting thereon. *Trustees of Hawesville* v. *Lander, &c.*, 8 Bush, 679.

BOUNTY FUND.

Legislative acts for purpose of raising bounty fund for payment of substitutes to go into the U. S. army unconstitutional, as to those who did not participate in procuring their passage, and have never ratified them nor received any benefit from them. A State cannot, by her own legislation, tax her own citizens for aiding or opposing a national war, for which they are liable to be taxed by the General Government. *Ferguson, &c.* v. *Landram, &c.*, and *Cloud, &c.* v. *Coleman, &c.*, 1 Bush, 548.

BRIDGES.

1. One county court cannot compel the court of an adjoining county to provide means to construct a bridge between the counties. If the counties differ, and one county court refuses to act, the circuit court of that county is made the arbiter between them. (Revised Statutes, chap. 84, secs. 30–35.) *Garrard Co. Court* v. *Boyle Co. Court*, 10 Bush, 208.

2. The owner of a private bridge is not liable for the loss of life or injuries sustained by a person crossing it, in the absence of a special right to pass, and an agreement upon the part of the owner to repair. *Louisville & Portland Canal Co.* v. *Murphy, adm'r, &c.*, 9 Bush, 522.

3. See COUNTY COURTS. (9 Bush, 704.)

4. Notwithstanding the previous grant of the ferry franchise, the right and power still existed in the Legislature of authorizing the erection of a bridge for better subserving the interests of the public; and the ferry owners are not entitled to compensation for incidental impairment of the profits of their ferry. *Piatt, &c.* v. *Covington and Cincinnati Bridge Co.*, 8 Bush, 31.

5. Under the act of incorporation (Session Acts, 1855–6, p. 426), the Louisville Bridge Co. had the right to acquire land by condemnation. *Reed, &c.* v. *Louisville Bridge Co.*, 8 Bush, 69.

BUILDING ASSOCIATIONS.

The sales at auction to its members, made by the Kenton Building and Savings Association, chartered by the Legislature of Kentucky, are loans of money, and usurious in character. *Herbert, &c.* v. *Kenton Building and Savings Association,* 11 Bush (Sept. 15, 1875).

CAPIAS PRO FINE.

1. A *capias pro fine* or other final process may be issued by a justice, to enforce a judgment in favor of the Commonwealth. *Ayars, &c.* v. *Cox,* 10 Bush, 201.

2. A judgment is merged by a bond replevying a *capias pro fine* which issued thereon; and a second *capias pro fine* cannot be issued on the judgment. *Commonwealth* v. *Merrigan,* 8 Bush, 131.

CARRIERS.

1. See RAILROADS.

2. Carriers may limit their common-law liability by special contract, made without duress, imposture, or delusion. The carrier must satisfactorily prove that a special contract was made, under circumstances indicating fairness and good faith; and it is then incumbent upon the shipper to show that the contract ought not, for some of the reasons above indicated, to be enforced against him. *Adams Express Co.* v. *Guthrie,* 9 Bush, 78.

3. A carrier cannot by contract relieve himself from liability for negligence of himself or agents, whether ordinary or otherwise. *Louisville, Cincinnati & Lexington Railroad Co.* v. *Hedger,* 9 Bush, 645.

4. A common carrier is one who carries passengers or goods, wares and merchandise for compensation; and the true principle of his liability is in the reward he receives. *Lee, &c.* v. *Burgess, &c.,* 9 Bush, 652.

5. A common carrier of "goods, wares, and merchandise" will not necessarily be presumed to be a common carrier of money and bank bills. *Ibid*, 652.

6. Where one is sought to be held liable as a common carrier of money and bank bills, it must be shown that he is such, if that class of carrying is not within the ordinary business in which he is engaged. *Ibid*, 652.

7. Special contracts for the transportation of live stock on a railroad will not exonerate the company from responsibility for damages resulting from a failure to provide a suitable and safe car for the carriage of the cattle. *Rhodes* v. *Louisville & Nashville Railroad Co.*, 9 Bush, 688.

8. If the car furnished was insufficient, the company is responsible for the damage resulting therefrom. *Ibid*, 688.

9. Public policy will not permit common carriers to limit, by special contract, their responsibility for damages, to injuries caused by the fraud or gross negligence of their agents or servants. *Ibid*, 688.

10. A deck passenger on a steamboat was assaulted and stricken down by the third clerk of the boat, and one of the boy's eyes destroyed. Verdict and judgment against the owners of the boat for $4,400 sustained. Common carriers of passengers held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and those employed by them. It is the duty of the carrier to use reasonable diligence to protect the passenger from insult and injury. *Sherley, &c.* v. *Billings*, 8 Bush, 147.

11. Necessary appendages of a traveler may be regarded as baggage. A gold watch, deposited by the traveler in a trunk, is held to be baggage, for which carrier is responsible. *American Contract Co.* v. *Cross*, 8 Bush, 472. And by act of March 2, 1860, subdiv. 6, sec. 670, Civil Code, the owner of lost baggage is made a competent witness in his own behalf. See also sec. 22, chap. 37, Gen. Stat., 413.

12. Special stipulations of an express company not to be responsible for loss or damage, unless caused by the fraud or gross negligence of the company, binding on the other party. *Adams Express Co.* v. *Loeb & Bloom*, 7 Bush, 499.

13. Goods consigned to the owner at Nashville, Tenn., to the care of N. W., & Co., Louisville, Ky., were delivered to M. & Co., at Louisville, to be stored and forwarded by them to the owner at Nashville. M. & Co. delivered them to a party not authorized to receive them, whereby they were not delivered to the owner. He was entitled to judgment against the carrier, and the carrier to a judgment against M. & Co., for the value of the goods. *Jeffersonville R. R. Co.* v. *White, &c.*, 6 Bush, 251. Until warehouseman and merchant receives goods consigned to his care, he has no power over them. *Same*, 251.

14. Carrier without compensation is liable for gross negligence. *Adams Express Co.* v. *Cressap*, 6 Bush, 572.

15. Common carrier cannot, by notices, exempt himself from losses by the malfeasance, misfeasance, or gross negligence of himself or his servants. If they convert the goods to any use, deliver to a wrong person not entitled to them, or are grossly negligent in the care or carriage of them, the loss must be borne by the carrier. (Story on Bailments, sec. 570.) *Orndorff & Co.* v. *Adams Express Co.*, 3 Bush, 194.

16. The receipt of an Express Co. contained this notice, "Valued under fifty dollars, unless otherwise herein stipulated." There were eight boxes of boots and shoes delivered to the company and receipted for, to be forwarded to Russellville. They were not delivered. It was adjudged that the company could not exonerate itself from liability for gross or even ordinary neglect by any such stipulation. *Same*, 194.

17. Kentucky Central R. R. Co. not liable for goods captured by Confederate troops, in June, 1864, at depot in Cynthiana, without culpable negligence of company or its agents. *Frank, &c.*, v. *Keith, &c.*, 2 Bush, 123.

18. Transportation by steamboats and railroads is necessarily such that the wharves of the former and depots of the latter are their places of delivery; and the liability of railroads for goods transported on their roads continues until the goods are ready to be delivered at their places of destination, and the owner or consignee has had reasonable opportunity of receiving and removing them; and that will depend upon the circumstances of each case, whether the goods arrive out of time. *Jeffersonville R. R. Co.* v. *Cleveland*, 2 Bush, 468.

19. Inattention of company's agents was the probable cause of the failure to carry the cotton, and the certain cause of the failure to show what became of it. *Adams Express Co.* v. *McDonald*, 1 Bush, 32.

20. The expression "shipped in good order and well conditioned," in bills of lading, considered as referring to the exterior and apparent condition of the boxes, and to their internal condition only so far as might be inferred from appearances. *Keith, &c.* v. *Amende*, 1 Bush, 455.

CAVEAT EMPTOR.

See CONTRACTS.

CEMETERY, OR GRAVEYARD.

1. A cemetery or graveyard cannot be subjected to sale, to pay for improvements on streets adjacent thereto. *Louisville* v. *Nevin, &c.*, 10 Bush, 549.

2. The chancellor will not decree that to be sold, the beneficial use of which would make the purchaser liable to punishment under the penal statutes of the State. *Louisville* v. *Nevin*, &c., 10 Bush, 549.

3. The chancellor properly refused to decree the sale of a graveyard filled with graves. *Ibid*, 549.

CHAMPERTY.

1. Sales and conveyances of lands made and executed contrary to the provisions of sec. 1 of the act of 1824, and sec. 2, chap. 12, Revised Statutes, are simply void and of no effect. The title remains in the vendor, and he may at any time disavow the transaction. The object of these statutes was to protect *bona fide* occupants of land against vexatious litigation, growing out of merely speculative adventures or purchases. (Cardwell v. Spriggs, 4 Dana, 36; Beatty v. Hudson, 9 Dana, 322.) *Crawley* v. *Vaughan, &c.*, 11 Bush (Nov. 5, 1875).

2. The statute does not provide that a champertous vendor shall forfeit his title; but that his conveyance shall be null and void. The grantee takes nothing under it, and can maintain no action upon it. (Rev. Stat., chap. 12, sections 2, 4, and 8.) *Crawley* v. *Vaughan, &c.*, 11 Bush (Nov. 5, 1875).

3. The act of 1824, and the provisions of the Revised Statutes, in regard to conveyances of land in adverse possession, are substantially the same; and do not embrace a case where the vendor had already litigated the title with the occupants, and had obtained a verdict and judgment in his favor which were irreversible. *Swager* v. *Crutchfield, &c.*, 9 Bush, 411.

4. A conveyance of land, pending an ejectment for it, does not affect the right of recovery. *Swager* v. *Crutchfield, &c.*, 9 Bush, 411.

5. A deed void by the champerty act of 1824 leaves the title still in the grantor, and is no obstacle to the progress of a suit previously commenced. *Swager* v. *Crutchfield, &c.*, 9 Bush, 411.

6. The champerty act of 1824 does not extend to a case in which neither the commencement, prosecution, nor result of the suit, can be traced to the sale or deeds impeached as violating the act. *Swager* v. *Crutchfield, &c.*, 9 Bush, 411.

7. A sale or conveyance of land after a final and unreversible judgment for its recovery has been rendered, is not embraced by the provisions of the Revised Statutes in reference to champerty and maintenance. *Swager* v. *Crutchfield, &c.*, 9 Bush, 411.

8. Rescission of a champertous contract, after commencement of the action, will not prevent the statutory bar to such action; but if before the action is commenced, the statute will not bar it. *Harman, &c.* v. *Brewster, &c.*, 7 Bush, 355.

CHANCERY, ISSUE OUT OF.

Courts of chancery jurisdiction have power to order a matter of fact, strongly controverted, to be tried by a jury. *Crabb* v. *Larkin, &c.*, 9 Bush, 154.

CHECKS.

See BANK CHECKS.

CHURCHES, AND CHURCH PROPERTY.

1. Conveyance of a lot of ground with a church thereon, to certain persons "in trust for the use and benefit of the colored members of the Methodist Episcopal Church South, etc., etc." *Held*—that this conveyance was for the sole use of the colored members of the Methodist Episcopal Church South. If all such beneficiaries have ceased to be members of that church organization, no one can enforce the trust. *Newman, &c.* v. *Proctor, &c.*, 10 Bush, 318.

2. Having allowed the colored members described in the deed to withdraw without objection, and having ratified that withdrawal, the Methodist Episcopal Church South at Danville, and the Conference of which it is a constituent, have lost for the time, at least, all right over the property. *Same*, 318.

3. The right to the church edifice can only be asserted through, and for the benefit of, a local society of colored members, in connection with the Methodist Episcopal Church South. (Gibson v. Armstrong, 7 B. Mon., 490.) *Same*, 318.

4. When persons have voluntarily associated themselves into a society of Christians, recognizing no ecclesiastical tribunal with authority to revise its final determinations, such a church is what is denominated congregational, and has the exclusive right to deal with its defaulting members; and this court cannot supervise or control that jurisdiction. *Lucas* v. *Case, &c.*, 9 Bush, 297.

5. Every person entering into a church impliedly, if not expressly, covenants to conform to its rules, and to submit to its authority and discipline. *Ibid*, 297.

6. The regularly constituted officers of a church, acting in good faith and within the scope of their authority, will be protected by law. *Ibid*, 297.

7. Words written or spoken in the regular course of church discipline, or before a tribunal of a religious society, to or of members of the church or society, are, as among the members themselves, privileged communications, and are not actionable without *express malice*. *Ibid*, 297.

8. Civil courts cannot disturb the action of church courts upon matters purely religious; but may interfere where church

property has been taken from the members of a church organization, by the arbitrary will of those constituting the judicature of such organization, without regard to the constitutional restraints by which it was intended that such property rights should be protected. *Kinkead, &c.* v. *McKee, &c.*, 9 Bush, 535.

9. Those having control of church property have no power to transfer it to a different sect, or to divert it from the purposes for which it was dedicated, when in violation of the fundamental law upon which the organization is based. *Ibid*, 535.

10. The Synod of Kentucky, adhering to the General Assembly of the Presbyterian Church of the United States of America, has the right to elect the trustees of Center College. *Ibid*, 535.

11. Exemptions of church property from taxation by general laws apply only to general purposes of government, State, county, etc., but not to the construction and reconstruction of streets in the city of Louisville. *Broadway Baptist Church et al.* v. *McAtee, &c.*, 8 Bush, 508.

12. In 1857, Penick conveyed to Chandler and others, in trust for the "Bethel Union Church," several acres of ground, on which a house of worship was erected, and at that time the church affiliated with the New School Presbyterians. The deed was burned with the records of the clerk's office of Marion county, in 1863. In 1865, Penick made a conveyance of the same house and ground to other trustees, for the use of the "Bethel Union Church, adhering to the General Assembly." In a contest about the title to the property, it was decided that the courts of this State have jurisdiction; and that Gartin, &c., who belonged to the "the Declaration and Testimony" party, should have the use of the church for one-half of the time. *Gartin, &c.* v. *Penick, &c.*, 5 Bush, 113. See the elaborate opinions of Judge Robertson and Chief Justice Williams.

13. "The Methodist Episcopal Church of the United States," and "the Methodist Episcopal Church South," are judicially known, since 1845, to be distinct organizations; and those who dissolved their connection with the latter society, and united with the former, cannot be regarded as a *party* within the meaning of the statute, occasioned by a schism or division of the society, and entitled to a proportion of the use of the property. (Rev. Stat., subsec. 4, of sec. 3, chap. 14, 1 Stanton, 236.)

McKinney, &c. v. *Griggs, &c.*, 5 Bush, 401. A dedication of land to a church for a parsonage may be made by parol. *Same*, 401. See Chief Justice Williams' dissenting opinion, 5 Bush, 411.

14. In the division of the Methodist Episcopal Church of the United States in 1844, the local societies and church property in Kentucky passed to the M. E. Church South, except those societies and churches bordering on the Ohio river, which were permitted by a vote to determine the question how they would go, North or South. *Humphrey, &c.* v. *Burnside, &c.*, 4 Bush, 215.

15. A suit may be maintained for church property by the trustees, or by a committee appointed for the purpose by the congregation. *Same*, 215.

16. By seceding from the Methodist Episcopal Church South, the majority of the Centre Street African Church in Louisville forfeited their right to the church property. *Lewis, &c.* v. *Watson, &c.*, 4 Bush, 228.

17. Defendant agreed in writing to dedicate land for church purposes only. It was wrong to adjudge a conveyance for church purposes and school purposes. *McDaniel* v. *Watson, &c.*, 4 Bush, 234.

18. To entitle the congregation to a conveyance of one acre of land on which they had erected a church building, which defendant had agreed in writing to convey, it should be alleged in the petition that the congregation had used and occupied the church, and in good faith intended to continue to do so. *Same*, 234.

CIRCUIT COURTS.

1. A trustee of the jury fund cannot act, by virtue of his original appointment, after the expiration of the term of four years. *Offutt* v. *Commonwealth*, 10 Bush, 212.

2. A special term of the circuit court may be held by the judge of another circuit, appointed and commissioned by the Governor for that purpose. *Baker* v. *Commonwealth*, 10 Bush, 592.

3. Circuit courts have jurisdiction to enforce liens and subject lands to the payment of demands less than fifty dollars. *Craig, &c.* v. *Garnett's adm'r, &c.*, 9 Bush, 97.

4. Circuit courts had jurisdiction to sell land of Confederate soldiers, on constructive service, during the late civil war. *Thomas* v. *Mahone*, 9 Bush, 111.

5. Ten days' notice of a special term directory. Eight days' notice, in this case, held sufficient. *Blimm* v. *Commonwealth*, 7 Bush, 320; *Huber* v. *Armstrong's widow and heirs*, 7 Bush, 590.

6. But an order of court must be made, either in term time or vacation, and entered on the order-book at least upon the day the special term begins, and before the court proceeds to transact business; and then no class of cases can be tried other than those for which the trial was ordered, but orders of preparation in civil and criminal cases may be made. *Huber* v. *Armstrong's widow, &c.*, 7 Bush, 590.

CITIES.

See TOWNS AND CITIES.

CITY OF LOUISVILLE.

Under the present charter of Louisville, actions to enforce payment or assessment for street improvements are governed by the Code of Practice; the charter of 1851 having, in this respect, been repealed. *Craycroft, &c.* v. *Selvage, &c.*, 11 Bush (April 16, 1875).

CLERICAL MISPRISION.

1. Judgment rendered against a defendant summoned out of the county where the action was brought, before judgment against a defendant summoned within the county, will be deemed a clerical misprision. (Civil Code, sec. 578.) *Duckworth* v. *Lee*, 10 Bush, 51.

2. Judgment rendered prematurely is a clerical misprision, and must be corrected by motion, under sec. 580, Civil Code, and not by suit under sec. 581. *Joyce* v. *O'Toole, &c.*, 6 Bush, 31.

3. Judgment, without service, is void, and may be reversed on appeal. *Long, &c.* v. *Montgomery*, 6 Bush, 394. The case of *Robinson* v. *Mobley*, 1 Bush, 196, overruled.

4. Process indorsed "executed," without signature, not sufficient, and the recital in the judgment that the summons had been served in time is not sufficient. *Same*, 394.

5. Judgment on an invalid bail bond not a clerical misprision. *Pauer* v. *Simon*, 6 Bush, 514.

6. Failure to mention in the judgment credits shown in the petition, a clerical misprision. *Long* v. *Gaines, &c.*, 4 Bush, 353; *Hieronymous, &c.* v. *Mayhall*, 1 Bush, 508.

CLERKS.

1. If clerk fails to make index to copy of record, he shall not be allowed any fee for making transcript. *Tracy, &c.* v. *Hornbuckle*, 8 Bush, 336.

2. Clerk cannot, by contract, charge more for making transcripts of records than allowed by law. *Bates, &c.* v. *Foree, &c.*, 4 Bush, 430.

3. Clerk will not be compelled to surrender transcript, partly made out before and completed by him after his expiration of term of office. If he unreasonably delays or refuses to make out transcript when required, he is liable on his bond. *Bates, &c.* v. *Foree, &c.*, 4 Bush, 430.

4. Clerk cannot adjudge what bail shall be given and take bond; and if he take such a bond, it cannot be enforced as a statutory bond. *Wallenweber* v. *Commonwealth*, 3 Bush, 68.

5. The official acts of a clerk placed in office by authority of the "Provisional Government of Kentucky" cannot be regarded as valid for any purpose. *Simpson's ex'x* v. *Loving, Jackson, &c.*, 3 Bush, 458.

6. Clerk is not liable for the loss of a debt by omitting to enter judgment therefor, unless the omission was caused by his gross negligence or fraud. *Commonwealth, &c.* v. *Thompson, &c.*, 2 Bush, 559.

CODE OF PRACTICE.

1. The Code of Practice is not a statute granting rights, but one defining remedies for the enforcement of rights. *Cook* v. *College of Physicians and Surgeons, &c.*, 9 Bush, 541.

2. Mandamus is confined in its application to certain classes of persons; and the courts cannot extend it to others. *Ibid*, 541.

3. The Civil Code does not divest rights previously granted. *Martin & Merriwether* v. *Mobile & Ohio R. R. Co.*, 7 Bush, 116.

4. Code shall be liberally construed. (Sec. 874.) *McGlasson* v. *Bradford*, 7 Bush, 250.

5. Provisions of Code must be strictly complied with, in proceedings on constructive service. *Brownfield, &c.* v. *Dyer, &c.*, 7 Bush, 505.

6. Code makes no change as to what facts constitute cause of action. *Richmond & Lex. T. P. Co.* v. *Rogers*, 7 Bush, 532.

7. Proceedings in penal cases are regulated by Code of Practice in civil cases. (Criminal Code, sec. 8.) *Wilson* v. *Commonwealth for use, &c.*, 7 Bush, 536. And where the matter in controversy does not exceed fifty dollars, pleadings may be oral. (Civil Code, sec. 827.) *Same*, 536. On an appeal from a justice of the peace to the circuit court, where the fines claimed did not exceed $50, court could not render judgment without proof, upon defendant's failing to file answer. *Same*, 536.

COLLECTING OFFICERS.

1. The penalty imposed by sec. 6, art. 11, chap. 92, General Statutes, on defaulting collectors, is ten per cent. on the principal, from the first day of June preceding the time when the money ought to have been paid into the treasury, and until paid. *Samuels, &c.* v. *Commonwealth*, 10 Bush, 491.

2. Under the act of February 26, 1873, the "county judge," and not the county court, has power to appoint a collector of back taxes for Jefferson county. *Hoke* v. *Field*, 10 Bush, 144.

COMITY BETWEEN STATES.

1. Resident creditors have preference in the courts of Kentucky over the assignee for benefit of creditors of an insolvent debtor, although the assignment was made in Ohio before the attachments were sued out in Kentucky. *Johnson* v. *Parker, &c.*, 4 Bush, 149.

2. Courts in Kentucky will not abate a suit on plea of pendency of prior suit in court of another State, for same debt and between same parties. *Davis* v. *Morton, Gault & Co.*, 4 Bush, 442.

COMMISSION MERCHANTS.

See BAILMENTS.

COMMISSIONER LOUISVILLE CHANCERY COURT.

1. Chancellor has power by act of 28 Feb., 1871, to remove the commissioner of the Louisville Chancery Court. *Smith* v. *Commonwealth and Cochran*, 8 Bush, 108.

2. The act of June 3, 1865, put it out of the power of the chancellor to remove the commissioner. *Smith* v. *Cochran and Commonwealth*, 7 Bush, 147. While that act was in force, the appointment of commissioner of the Louisville chancery court, when there was no vacancy, was void, and one improperly appointed and holding the office was an usurper. *Smith* v. *Cochran*, 7 Bush, 154.

COMMISSIONER'S REPORT.

Exceptions to commissioner's report admit everything not excepted to. He has power to report testimony as to matters referred to him, and it is not necessary to take formal depositions before an examiner, nor need they be certified otherwise than by the master in his report. *Taylor* v. *Young's adm'rs*, 2 Bush, 428.

COMMISSIONER'S SALES.

1. A bidding at an auction may be retracted before the hammer is down. Every bidding is nothing more than an offer on one side; which is not binding on either side until it is assented to, and that assent is signified on the part of the seller by knocking down the hammer. (1 Parsons on Contracts, 479, 480; 2 Kent's Com., 538; Payne v. Cave, 3 T. R., 148; Downing v. Brown, &c., Hardin, 181.) *Grotenkemper & Co.* v. *Achtermeyer & Co.*, 11 Bush (June 16, 1875).

2. Sales of infants' lands must be in pursuance of notice, and the judgment must be pursued both in the advertisement and sale. *Cofer* v. *Miller*, 7 Bush, 545.

3. It is against the policy of the law to permit the officers of the court to use their authority for purposes of gain to themselves; and an officer cannot do so, either in his own name or as partner of another; and profits realized by them from such transaction they will be liable for. *Chatham* v. *Pointer, Fisher & Co.*, 1 Bush, 423.

4. Funds in the hands of a receiver are potentially under the control of the court; and a bond taken therefor, although not provided by statute, is good and valid as a common law bond. *Rowlet* v. *Eubank, &c.*, 1 Bush, 477; *Ellis* v. *Carr, guardian, &c.*, 1 Bush, 527.

5. Sale by commissioner is not concluded till confirmed by the court. Sale, in this case, set aside because of inadequacy of price. *Egard* v. *Chearnly et al.*, 1 Bush, 12.

6. Commissioner's report of sale at the court-house door, on a county court day, after notice, cures defect in judgment in not fixing time and place of sale. A slight error in the amount of interest will not affect the sale. *Doughty* v. *Moss, &c.*, 1 Bush, 161.

7. After sale for cash, and delivery of property, commissioner is presumed to have received the purchase money. *Ellis* v. *Carr, guardian, &c.*, 1 Bush, 527.

8. In making sales of land, the notice must be in pursuance of the power, and the sale in pursuance of the notice. Otherwise, sale will be invalid. *Hahn* v. *Pindell*, 1 Bush, 538. A

notice to sell in gross, and sale made in parcels, and *e converso*, invalid. *Same*, 538.

9. Sale advertised to take place at 1 o'clock, set aside because made before that hour, when property sold for less than its value, and bidders were misled as to time of sale. *Williams & Davis* v. *Jones, &c.*, 1 Bush, 621.

COMMITMENT.

An order of commitment of a prisoner to jail should state the cause of commitment, and the length of time he is to be held. *Ayers, &c.* v. *Cox*, 10 Bush, 201.

COMMONWEALTH'S ATTORNEY.

A commonwealth's attorney, by entering his own name on an indictment as prosecutor, cannot thereby secure for himself the compensation promised under sections 6 and 7, chapter 42, of the Revised Statutes. (2 Stanton, 565.) His salary and perquisites are fixed by law, and the Commonwealth is therefore entitled to his full services. An order indorsing fifty per cent. of a fine for the benefit of such attorney is *coram non judice*, and void. *Harris* v. *Beavan, &c.*, 11 Bush (June 28, 1875).

COMMON SCHOOLS.

1. "Every school which was put under the control of trustees and commissioners pursuant to chapter 88 of the Revised Statutes, and which should be *actually kept* by the qualified teacher, and at which every free white child in the district between the ages of 6 and 18 years should have the privilege of attending, whether contributing anything toward defraying the expenses thereof or not, *and none other*, should be deemed a common school, or entitled to any contribution out of the school fund." "The Constitution prohibits the use of the school fund for any other purpose except *to defray the expenses of schools actually taught according to law.*" *Collins* v. *Henderson, &c.*, 11 Bush (April 7, 1875).

2. The Constitution not only prohibits the diversion of the whole common school fund by a single act, but it equally prohibits the diversion of any part of it to any other purpose; and then it is declared that the income, including the proceeds of taxes levied for purposes of education, may be appropriated in aid of common schools, *but for no other purpose*. *Collins* v. *Henderson, &c.*, 11 Bush (April 7, 1875).

3. The purchase of Collins' History of Kentucky is not "in aid of common schools," and the appropriation to pay for same out of the school fund is unconstitutional. *Collins* v. *Henderson, &c.*, 11 Bush (April 7, 1875).

4. "Not only was the system of common schools, provided for by the constitution, intended to be general and uniform, but it was *intended to be controlled by the Legislature*." *The Auditor* v. *Holland, com'r, &c.*, 11 Bush (Nov. 4, 1875). But see the Collins' History of Kentucky case, *Collins* v. *Henderson*, 11 Bush (April 7, 1875, and MS. response to petition for rehearing (Nov. 4, 1875).

5. The act of February 23, 1874 (Acts 1873–'4, p. 483), "for the benefit of common schools in Marshall, Livingston, and McCracken counties," does not require the county courts of those counties to apply the fund in aid of common schools, or to invest it for the benefit of such schools; and is not constitutional. (Sec. 1, art. 11, Constitution; *Halbert* v. *Sparks*, 9 Bush, 259.) *The Auditor* v. *Holland, com'r, &c.*, 11 Bush (Nov. 4, 1875).

6. The power of the States to establish common school systems was not delegated to the United States, or prohibited to the States by the Constitution. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

7. A party must be prejudiced by the enforcement of a statute, or he cannot object to its constitutionality. (Cooley's Constitutional Limitations, 164.) *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

8. Taxation in general must be equal; but those alone who receive special and peculiar benefits are made to pay the tax. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

9. Taxation for school purposes may be constitutionally imposed; and one receiving his full share of the benefits will not be heard to complain. (8 Cowen, 543; 56 Penn., 359; 22 Grattan, 857.) *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

10. If the tax paid by negroes was expended for the exclusive benefit of the whites, the taxation would be unconstitutional as to the negroes, but would not render the school laws unconstitutional as to whites. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

11. The vote of the people of a district in relation to a tax for school purposes, under the act of March 11, 1873, is not an election. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

12. Trustees of each district in the county have a separate cause of action against a defaulting county school commissioner and his sureties, for the benefit of the teacher of each district. *Hammond* v. *Crawford, &c.*, 9 Bush, 75.

13. Such an action, in the name of the trustees of all the districts in the county, would be a misjoinder of parties plaintiff. *Hammond* v. *Crawford, &c.*, 9 Bush, 75.

14. A subsequently appointed commissioner cannot maintain an action, as relator in the name of the Commonwealth, against such defaulting commissioner and his sureties. *Hammond* v. *Crawford, &c.*, 9 Bush, 75.

15. Sureties of a defaulting common school commissioner are not responsible for money drawn from the treasury by him, unless it was drawn according to law. *Hammond* v. *Crawford, &c.*, 9 Bush, 75.

16. The petition, in an action against the sureties of a school commissioner, should contain a statement of every fact necessary to show that the auditor had authority to draw his warrant on the treasurer for the amount drawn by the commissioner. *Hammond* v. *Crawford, &c.*, 9 Bush, 75.

17. The common school fund cannot be appropriated or devoted to the payment of teachers not acting under the control or supervision of the officers of the common schools. *Halbert* v. *Sparks*, 9 Bush, 259.

18. The General Assembly has power to pass laws regulating the manner in which the common school fund shall be devoted to the purposes for which it has been set apart; but these laws,

as far as practicable, should be general in their application. *Ibid*, 259.

19. Special legislation, except in aid of the general system, or for relief against hardships, etc., is calculated to destroy the system of common schools which the constitution declares shall be maintained. *Ibid*, 259.

20. The Legislature has the power to prescribe how and by whom commissioners of common schools shall be elected. *Johnson* v. *De Hart*, 9 Bush, 640.

21. The election of a commissioner of common schools, under the act of March 21, 1870, may be *viva voce* or by ballot. *Ibid*, 640.

22. In such an election a justice, voting under a misapprehension, may change his vote after the result is announced, or all may vote again; and when fairly done, no tribunal can review their action. *Ibid*, 640.

23. Money due a common school teacher cannot be attached. *Tracy & Loyd* v. *Hornbuckle and wife*, 8 Bush, 336.

24. Farming lands in the city of Henderson liable to school tax, by act of March 15, 1869. *City of Henderson* v. *Lambert*, 8 Bush, 607. Such lands are not liable to be taxed for payment to subscription for stock to the E., H. and N. R. R. Co. *Same*, 607.

25. Office of teacher and trustee of common school incompatible. *Ferguson* v. *True, &c.*, 3 Bush, 255. Whatever the public funds lack of paying the teacher should be raised and collected by the trustees, by subscription or otherwise; and if they fail to do so, they are liable personally. The teacher should have nothing to do with collecting this fund or raising it. *Same*, 255.

26. Where a teacher is employed to teach for a definite time, and is, by notice, ejected from the school-house before the time expires, in an action for a tort he may recover damages for the whole time against those who eject him. *Hill and Bergen* v. *Harris*, 4 Bush, 451.

27. Trustees are personally liable to the teacher, where the contract fails to exempt them. The teacher may set-off his claims for services against a note of one of the trustees, in an action against him. (Civil Code, secs. 39, 128.) *Harrison* v. *Slone*, 4 Bush, 577.

COMPOUNDING DEBT.

Compounding between debtor and creditor, when no fraud nor unfair concealment is alleged, is now upheld. *Ricketts* v. *Hall & Long*, 2 Bush, 249; *Pepper & Watson* v. *Aiken, &c.*, same, 251.

COMPUTATION OF TIME.

See DAYS; and SUNDAY.

CONFEDERATE CURRENCY.

1. A soldier of Bragg's army came within the Federal lines, and remained. While there, he received Confederate currency in payment of a debt from a citizen of the State. *Held*—that the party receiving it was bound by it. *Ewing* v. *Litsey*, 7 Bush, 496.

2. On a note, payable in Confederate currency, executed within the Confederate lines during the war, payee is liable for the gold value of the consideration of the note when payable. *Rivers* v. *Moss' assignee*, 6 Bush, 600.

3. Contracts made within the Confederate States, during the war, for Confederate currency, will be enforced. *Martin* v. *Hortin*, 1 Bush, 629; *Rodes* v. *Patillo, &c.*, 5 Bush, 271.

CONFESSIONS.

1. If part of a conversation is relied on as proof of confession of crime, the accused has the right to lay before the court all the conversation relative to the matter in issue. *Berry* v. *Commonwealth*, 10 Bush, 15.

2. The testimony of a witness called to prove a confession is inadmissible as evidence, if he does not remember the substance of all that was said at the time on the subject. *Berry* v. *Commonwealth*, 10 Bush, 15.

3. Confessions out of court must be corroborated. *Cunningham* v. *Commonwealth*, 9 Bush, 149.

4. The jury must determine from the evidence whether any confessions of guilt were in fact made by the accused. *Cunningham* v. *Commonwealth*, 9 Bush, 149.

CONFLICT OF LAWS.

The enactment of a law by Congress, making it a misdemeanor to compound or sell an illuminating oil, inflammable at less temperature or fire test than 110 degrees Fahrenheit, "was a mere police regulation, and can only have effect where the legislative authority of Congress excludes, territorially, all State legislation—as, for example, the District of Columbia. Within State limits it can have no constitutional operation." (U. S. v. Dewitt, 9 Wallace, 41.) *Patterson* v. *Commonwealth*, 11 Bush (Sept. 22, 1875).

CONFUSION OF GOODS.

1. A merchant made a fraudulent sale of his stock of merchandise to his son, and the son afterwards added to the stock by purchases and diminished it by sales. The creditors of the father attached the goods, and those of the son levied executions on them. *Held*—that the goods purchased by the son, after the delivery of the father's stock, were subject to the executions; and so much of the original stock remaining unsold were liable to the attaching creditors, and the son personally, liable for so much of the original stock as he had sold. *Carter, &c.* v. *Carpenter, &c.*, 7 Bush, 257.

2. A party who fraudulently confounds the goods of a debtor with his own, if such goods are levied on or attached, must identify or lose his own property. *Weil & Bro.* v. *Silverstone, &c.*, 6 Bush, 698.

CONSIDERATION.

1. Contracts having for their consideration an agreement to stifle a criminal prosecution are void. If any part, however small, of the entire consideration be vicious, the whole contract is void. *Kimbrough* v. *Lane, &c.*, 11 Bush (Nov. 27, 1875).

2. Over three and four years after the payment by a married woman, from means given her by her father, of $10,872 of the purchase price of 305 acres of land sold by said executor to her husband, ten years before, but not paid for by him—the executor executed a "bond to convey to her so much of said tract as said money will pay for at the price of $79 30 per acre, her part to include the dwelling-house and improvements." Upon suit being brought to compel the conveyance, he "withdrew any offers he had made, and claimed that the writing executed to her was not obligatory because made without consideration, and denied that she was entitled to a conveyance of the land or to recover against him personally the money she had paid." The court below gave judgment for 101 acres, including the improvements; but this court, on appeal, reversed the judgment, and remanded the case, with directions to dismiss the petition. *Peters, &c.* v. *Bourne, &c.*, 11 Bush (March 22, 1875).

3. In the case of a gift of property by a father to his daughters, and which descends to their children, what is a "valuable consideration." *Tanner, &c.* v. *Skinner, &c.*, 11 Bush (April 13, 1875).

4. The plea of no consideration for a written obligation does not cast the burden of proving the consideration upon the plaintiff. (Rudd v. Hanna, 4 Mon., 531; Taylor v. Ashby, 2 J. J. Marsh., 415.) *Trustees Kentucky Female Orphan School* v. *Fleming, ex'r, &c.*, 10 Bush, 234.

5. A promissory note given for a donation to a charitable institution is obligatory, if by its charter it may receive such donations; the consideration is, the applying the fund to the charitable purpose of the institution. (Collier v. Baptist Education Society, 8 B. Mon., 68.) *Trustees Kentucky Female Orphan School* v. *Fleming, ex'r, &c.*, 10 Bush, 234.

6. That the debtor was the *son* of the creditor constituted a sufficient consideration for a release. *Arnold* v. *Park*, 8 Bush, 3.

7. Failure of consideration of a note executed in Ohio and payable in Illinois, decided by the laws of Kentucky in this particular case. *Roots* v. *Merriwether*, 8 Bush, 397.

CONSTABLES.

1. See BONDS. *Boswell & Lemmon* v. *Sheriff*, 8 Bush, 97.

2. Assistant constable appointed for Woods' district in Jefferson county may act as constable in the city of Louisville. *Rutledge* v. *Farrar*, 6 Bush, 491.

3. A constable may execute a summons directed to the sheriff. (Civil Code, sec. 66.) And his return thereon shall be proof of time and manner of its service. (Sec. 73.) *Long* v. *Gaines, Berry & Co.*, 4 Bush, 353.

4. When a constable has authority to execute the process of the court having original jurisdiction of the amount placed in his hands for collection, his sureties are liable for the amount, which in this case is $75. (3 Bush, 555.) *Commonwealth, for use of Young* v. *Peters*, 4 Bush, 403.

5. A bond not in pursuance of sec. 709, Civil Code, presents no bar to an action against a constable for the wrongful seizure of property. A constable and his surety on his official bond are liable for the tortious acts of the constable under color of his office, as for non-feasance and unintentional misfeasance; but not for constable's acts of violence, which are personal wrongs. A constable has no right to force open an outer door or window, which is closed and fastened, although not under lock, to make a levy of a *fi. fa.* or distress warrant. *Jewell* v. *Miles, &c.*, 3 Bush, 62.

6. Surety in the official bond of constable is not liable for money collected by constable, on a demand and mortgage for $262 67 which were placed in his hands for collection. *Commonwealth for Arnold* v. *Sommers*, 3 Bush, 555.

CONSTITUTIONAL LAW.

1. See COMMON SCHOOLS; CONTEMPT; and WILLS (9 Bush, 547).

2. The right of a State to protect its citizens from the danger attending the use of inflammable oils or mixed fluids although patented, is not inconsistent with any patent regulation, nor in violation of the Federal Constitution. The statute of Feb. 21,

1874, entitled "An act for inspecting and gauging oils, liquors," &c., is constitutional. *Patterson* v. *Commonwealth*, 11 Bush (Sept. 22, 1875).

3. The act which directs payment for Collins' History of Kentucky, for the several school districts in this State, to be made out of the proceeds of a tax levied for common school purposes, is to that extent unconstitutional. *Collins* v. *Henderson*, 11 Bush (April 7, 1875).

4. All doubts existing in the mind of the court as to the constitutionality of an act of the Legislature must be resolved in favor of its validity. *Collins* v. *Henderson, &c.*, 11 Bush (April 7, 1875).

5. The particular manner in which the object of an act is to be accomplished need not, and indeed cannot, be expressed in the title. If the act indicates with clearness the subject about to be legislated upon, and the act itself is confined to that subject, that is all the constitution requires. (Sec. 37, art. 2, Constitution of Ky.) *Collins* v. *Henderson, &c.*, 11 Bush (April 7, 1875).

6. An act requiring county court to subscribe for stock in a railroad company, in behalf of a precinct through which the railroad passes, is not unconstitutional. *Allison, &c.* v. *Louisville, Harrod's Creek & Westport Railway Co.*, 10 Bush, 1.

7. Preamble in the act is held to be at least *prima facie* evidence of the fact set forth in the preamble. *Ibid*, 1.

8. The Legislature may, under certain considerations, grant privileges to corporations which no legislation afterwards can impair, without the consent of the parties interested. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Commonwealth*, 10 Bush, 43.

9. The taxing power of the State is never presumed to be relinquished, unless the relinquishment is expressed in clear terms. (Bradley v. McAtee, 7 Bush, 667.) *Louisville, Cincinnati & Lexington R. R. Co.* v. *Commonwealth*, 10 Bush, 43.

10. The Legislature had the constitutional right to pass the act of Feb. 20, 1864, changing the mode of assessing and taxing the railroads in the State, and repealing all laws and charter provisions in conflict with it, unless it be in cases where the State had expressly relinquished the right of taxation in consideration

of some public benefit. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Commonwealth,* 10 Bush, 43.

11. A corporation chartered in one State is granted certain powers in a second State. *Held*—that an amendment to the charter in the first State is not invalid because in conflict with some law of the second. *City of Covington* v. *Covington & Cincinnati Bridge Co.,* 10 Bush, 69.

12. The Legislature of Kentucky incorporated a bridge company; but withheld the power of organization until the Ohio Legislature should confirm the act of incorporation, which was afterwards done. *Held*—that the State of Kentucky had the power to create such corporation, with any right not unconstitutional, and it was essentially a Kentucky corporation. Similar legislation need not be obtained from each State, before any amendment can be made to the original charter, or additional power conferred. (12 Wallace, 65.) *City of Covington* v. *Covington & Cincinnati Bridge Co.,* 10 Bush, 69.

13. The dissolution of attachments in State courts, by operation of the bankrupt act, in no sense impairs the obligation of a contract, the attachment lien being secured by legal diligence, and not by contract. *Bank of Columbia* v. *Overstreet, &c.,* 10 Bush, 148.

14. All constitutional laws of Congress are binding upon State courts; and, though not bound to administer, State courts must respect all rights acquired under, such laws. *Bank of Columbia* v. *Overstreet, &c.,* 10 Bush, 148.

15. The act of Feb. 18, 1854, entitled "An act to provide for the appointment of special judges of the county court and police or city courts," and which contains a provision for holding special terms of county courts, is not within the inhibition of the constitution, that an act shall relate to but one subject, which shall be expressed in the title. *Jacob's adm'r* v. *Louisville & Nashville R. R. Co.,* 10 Bush, 263.

16. A statute merely remedial may be applied to actions existing at the time it became a law, without affecting vested rights. (4 How., 145; 1 Barb., 648; 6 Seld., 374; Cooley's Constitutional Limitations, 288.) *Broaddus' devisees* v. *Broaddus' heirs,* 10 Bush, 299.

17. The act approved March 2, 1863 (Myers' Sup., 29, and sec. 847, Civil Code), has two subjects expressed in its title, to-wit, "appeals" and "officers of the quarterly court," and is therefore unconstitutional and void. *Hind* v. *Rice*, 10 Bush, 528.

18. The courts will not pass upon a constitutional question, and decide a statute invalid, unless a decision upon that very point is necessary to the determination of the cause. (Cooley's Constitutional Limitations, 160, 163; 19 Ind., 287; 9 Ohio St., 373.) *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

19. A legislative enactment will be upheld, unless clearly unconstitutional. (McReynolds v. Smallhouse, 8 Bush, 447; 9 B. Mon., 513.) *Cumberland & Ohio R. R. Co.* v. *Barren County Court*, 10 Bush, 604.

20. Prior to the adoption of the fourteenth amendment to the Federal Constitution, negroes were not citizens of the State or of the United States. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

21. The thirteenth amendment abolished slavery; but removed no disabilities from the negro, and gave no political rights, except such as the various States permitted. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

22. The object of the fourteenth amendment was to elevate the negro to a political status, without affecting the constitutional rights, etc., of the white race. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

23. The power of the States to establish common school systems was not delegated to the United States, or prohibited to the States, by the constitution. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

24. A party must be prejudiced by the enforcement of a statute, or he cannot object to its constitutionality. (Cooley's Constitutional Limitations, 164.) *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

25. Taxation, in general, must be equal; but those alone who receive special and peculiar benefits are made to pay the tax. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

26. If the tax paid by negroes was expended for the exclusive benefit of the whites, the taxation would be unconstitu-

tional as to the negroes, but would not render the school laws unconstitutional as to whites. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

27. The vote of the people of a district in relation to a tax for school purposes, under the act of March 11, 1873, is not an election. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

28. Such statutes are constitutional, though they depend for their final effect upon the discretionary acts of individuals or others. (Slack v. Maysville & Lexington R. R. Co., 13 B. Mon., 25.) *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

29. Taxation for school purposes may be constitutionally imposed, and one receiving his full share of the benefits will not be heard to complain. (8 Cowen, 543; 56 Penn., 359; 22 Grattan, 857.) *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

30. The deprivation of the right to hold office is a punishment, and sec. 20, art. 8, of the State Constitution so intended. *Commonwealth* v. *Jones*, 10 Bush, 725.

31. Section 20, article 8, of the State Constitution, is of itself a perfect statute; and one violating it may, by indictment, etc., be deprived of the right to hold office, independent of any legislative action on the subject. *Commonwealth* v. *Jones*, 10 Bush, 725.

32. The contesting election board cannot inquire into a violation of the law in regard to dueling, by one elected to an office; nor, if certain of his guilt, can they declare the office vacant. *Commonwealth* v. *Jones*, 10 Bush, 725.

33. The action of the contesting board, within its jurisdiction, is final and conclusive. But when courts are called on to enforce the judgments of the board, they have power to inquire into its jurisdiction in the case. *Commonwealth* v. *Jones*, 10 Bush, 725.

34. The contesting board may determine whether the person elected has all, and only, the constitutional qualifications. *Commonwealth* v. *Jones*, 10 Bush, 725.

35. It is difficult to draw the exact line of demarkation between executive and judicial powers. But where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and the decision may destroy that right, the power to be exercised is essentially judicial, and cannot be

delegated to executive officers. *Commonwealth* v. *Jones*, 10 Bush, 725.

36. The words "qualifications" and "qualified" in the constitution, signify not only the circumstances that are requisite to enable a citizen to vote or hold office, but also to denote an exemption from all legal disqualifications for either purpose. (17 B. Mon., 784.) *Commonwealth* v. *Jones*, 10 Bush, 725.

37. There are no implied exceptions to the bill of rights; it is to remain forever inviolate. *Commonwealth* v. *Jones*, 10 Bush, 725.

38. That construction, which will preserve unimpaired the right of trial by jury, should always govern in interpreting laws involving the forfeiture of civil or political rights. *Commonwealth* v. *Jones*, 10 Bush, 725.

39. Any question of constitutional authority, which might have been raised when an act was done, will be open for consideration and determination, should the act become the subject of proceedings in court. (8 B. Mon., 655.) *Commonwealth* v. *Jones*, 10 Bush, 725.

40. The constitutional provisions relating to dueling are not self-executing, except when a person refuses to take the constitutional oath. *Commonwealth* v. *Jones*, 10 Bush, 725.

41. A citizen, who takes the constitutional oath of office, cannot be indicted for usurpation of office until he has been first convicted of the disqualifying offense. But if he takes the oath falsely, he may be indicted for the crime thereby committed. *Commonwealth* v. *Jones*, 10 Bush, 725.

42. One's guilt cannot be tried in any other than a direct proceeding. (1 Dana, 511.) *Commonwealth* v. *Jones*, 10 Bush, 725.

43. The "expatriation act," approved March 16, 1862, was unconstitutional and void. *Burkett* v. *McCarty*, 10 Bush, 758.

44. A citizen may expatriate himself, but no act of legislation can denationalize a citizen without his concurrence. *Burkett* v. *McCarty*, 10 Bush, 758.

45. Such compulsive excission cannot be inflicted without judicial conviction of some crime. *Burkett* v. *McCarty*, 10 Bush, 758.

46. Whether a citizen has been guilty of an offense involving the forfeiture of his right to vote is necessarily a judicial question, to be tried on indictment or presentment, and cannot be adjudged by the officers of the election; nor can a test-oath be required in such case; nor can the refusal to take such oath be deemed a conviction of the imputed offense. *Burkett* v. *McCarty*, 10 Bush, 758.

47. A legislative act cannot make voluntary rebellion involuntary expatriation. *Burkett* v. *McCarty*, 10 Bush, 758.

48. It is not slander to charge that one has falsely taken an oath prescribed by a void act of the Legislature. *Burkett* v. *McCarty*, 10 Bush, 758.

49. An office cannot be constitutionally adjudged forfeited for crime without trial and conviction. *Burkett* v. *McCarty*, 10 Bush, 758.

50. The Legislature has no constitutional power to require a reduction to be made from the salary of the chancellor of the Louisville chancery court, except for neglect of official duty. The proviso of the act of Feb. 11, 1871, "that the allowance to judges and chancellors *pro tem.* shall be paid out of the increased salary of the judge or chancellor," which requires a deduction except for neglect of official duty, is to such extent unconstitutional and void. *Auditor* v. *Cochran*, 9 Bush, 7.

51. A void act of the Legislature cannot be ratified or made obligatory. *Auditor* v. *Cochran*, 9 Bush, 7.

52. The act of March 8, 1867, providing for assessment and collection of a tax on the income derived from interest paid on United States bonds, is repugnant to the Constitution of the United States. *Bank of Kentucky* v. *Commonwealth*, 9 Bush, 46.

53. A curative act of the Legislature, after suit was instituted, could not affect the rights of the parties to the suit, or the law as it existed at the time the petition was filed. *Allison, &c.* v. *Louisville, Harrod's Creek & Westport Railway Co.*, 9 Bush, 247.

54. The judicial being a co-ordinate and independent department of the State government, neither of the other departments can constitutionally interfere with it in the exercise of its exclusive right to determine the law of existing cases. *Allison, &c.* v. *Louisville, Harrod's Creek & Westport Railway Co.*, 9 Bush, 247.

55. Act to separate the offices of commissioner and receiver of the Louisville chancery court, approved February 28, 1871, constitutional. *Smith* v. *Commonwealth and Cochran*, 8 Bush, 108.

56. No law shall relate to more than one subject, and that shall be expressed in the title. This provision of the constitution not violated by reducing limitation to six months. See sec. 7 of an act to amend charter of L. & F. R. R. Co., approved 23d February, 1856, which is constitutional. *O'Bannon* v. *Louisville, Cin. & Lex. R. R. Co.*, 8 Bush, 348.

57. Act approved March 9, 1868, to incorporate the Green and Barren River Navigation Co., constitutional. *McReynolds* v. *Smallhouse*, 8 Bush, 447.

58. Amendment of 1869, of the charter of city of Covington, authorizing northern portion of Madison street to be paved with Nicholson pavement, held to be unconstitutional. *Howell, &c.* v. *Bristol, &c.*, 8 Bush, 493.

59. No memorial or petition to the Legislature, praying for the division of a county, etc., shall be received or acted upon unless published, etc., two months prior to the meeting of the Legislature. This sec. 8, chap. 62, 2 Stanton's Rev. Stat., 120, being disregarded by the Legislature, was constructively repealed. *Swift & Co.* v. *City of Newport*, 7 Bush, 37.

60. Property subject to creditor's debt when created, cannot afterwards be exempted from that liability. *Kibbey* v. *Jones*, 7 Bush, 243.

61. Transferring management of turnpike road in Simpson county, held constitutional. *Simpson Co. Court* v. *Arnold, &c.*, 7 Bush, 353.

62. Legislature can delegate power of taxation to local municipal governments. *Bradley* v. *McAtee, &c., and City of Louisville*, 7 Bush, 667.

63. Title may pass by act of the Legislature, with the assent of the holder thereof. *Trustees of Hawesville* v. *Hawes' heirs*, 6 Bush, 232.

64. Prohibiting sale of goods by sample in Louisville, by non-resident, having no place of business in said city, is constitutional. (Act March 2, 1860, 2 Stanton, 805.) *Commonwealth* v. *Smith*, 6 Bush, 303.

65. Neither State nor Federal Constitution is violated by the act making it a penal offense for non-residents of Kentucky to sell by sample without license. *Mork* v. *Commonwealth*, 6 Bush, 397.

66. For the same offense, to be put twice in jeopardy of life or limb, means that no person shall be twice tried for the same offense; and a defendant is not put in jeopardy until a verdict is rendered for or against him. *O'Brian* v. *Commonwealth*, 6 Bush, 563.

67. Sec. 4, art. 4, chap. 83, Rev. Stat. (2 Stanton, 246), and act 18th Feb., 1864 (Myers' Sup., 410), imposing on agents of foreign insurance companies a tax on all premiums received in this State, and penalty for failing to pay same, held to be constitutional. *Phœnix Ins. Co.* v. *Commonwealth*, 5 Bush, 68.

68. In war, pressing emergency may authorize seizure of private property, before making or providing for compensation. *Sellards, &c.* v. *Zomes*, 5 Bush, 90; and *Eifort, &c.* v. *Bevins*, 1 Bush, 461.

69. An unconstitutional law will be binding on such as aided in procuring its passage or by becoming recipients of benefits under it. *Ferguson, &c.* v. *Landram, &c.*, 5 Bush, 230.

70. A general law controls local statutes, unless there is manifested in the latter a special intent to repeal the former. *Commonwealth* v. *Pointer*, 5 Bush, 301.

71. The Legislature has power to regulate the relative rights and responsibilities of the proprietors of inclosed land, and the owners of stock going at large or kept in adjacent inclosures. (Chap. 50, Rev. Stat., and Myers' Sup., 272.) *Wills* v. *Walters*, 5 Bush, 351.

72. The act., 26 Feb., 1868, to enlarge the jurisdiction of the Louisville chancery court, held to be constitutional. *Turner, &c.* v. *Elb*, 5 Bush, 437.

73. The increase of the levy after sheriff has executed bond, imposes no additional duty on him. (12 B. Mon., 278; 2 Met., 199.) *Commonwealth for Mercer Co.* v. *Gabbert's adm'r, &c.*, 5 Bush, 438.

74. Act of Feb. 16, 1869, repealing sec. 6 of the act of Feb. 6, 1854, amending the charter of the Covington and Lexington R. R. Co., and establishing a tariff of way freights on said

road, held unconstitutional—no right of amendment having been reserved in the charter. *Hamilton* v. *Keith, &c.*, 5 Bush, 458.

75. Legislature may authorize suit against the State, and direct auditor to draw his warrant for amount of judgment, *even though the yeas and nays are not entered on the journal* on the passage of the bill. *Commonwealth* v. *Jackson*, 5 Bush, 680.

76. The act of 24th Feb., 1865 (1 Session Acts, 1867–'8), providing for the organization of a police force for the city of Louisville and county of Jefferson, declared constitutional. *Police Com'rs* v. *City of Louisville*, 3 Bush, 597.

77. Act of Feb. 17, 1866 (Myers' Sup., 752), providing for confirmation of sales of infants' real estate, on petition of purchaser, is held constitutional. *Boyce and wife* v. *Sinclair*, 3 Bush, 261.

78. State laws giving jurisdiction to State courts in cases of admiralty, of which Federal courts have exclusive jurisdiction, void to extent that they infringe on the act of Congress of 1789. *Stewart* v. *Harry*, 3 Bush, 438.

79. The act of 22 Feb., 1874 (Myers' Sup., 1), enforceable so far as it applies to guerrillas or predatory bands of lawless soldiers; and the act of 28 Feb., 1867 (Sess. Acts, page 51), called the "Amnesty Act," does not apply to guerrillas or unlicensed trespassers. *Haddix* v. *Wilson*, 3 Bush, 523.

80. The act of March 9, 1868, repealing the act of March 4, 1865, incorporating "The Kentucky Insurance Co.," is constitutional. The statute (2 Stanton, 121) reserves the power generally to repeal such charters. *Griffin* v. *Ky. Ins. Co.*, 3 Bush, 592.

CONSTRUCTION OF STATUTES.

1. An act which seems to contemplate a vote by the people of each common school district, but which did not make the purchase of a certain book (Collins' History of Kentucky) depend upon such vote being had, is not void for the want of the assent of the voters of the several districts. *Collins* v. *Henderson*, 11 Bush (April 7, 1875).

2. A statute must be construed with the view of attaining the object of the legislature in enacting it, when it can be done without doing violence to the language of the act. (Secs. 15, 16, chap. 21, General Statutes.) *Commonwealth* v. *Gale*, 10 Bush, 488.

3. New statutes will not be considered to operate retroactively, unless the nature of the case or the language used plainly show they were so intended to operate. (Potter's Dwarris, 162; Cooley's Constitutional Limitations, 370.) *Cumberland & Ohio R. R. Co.* v. *The Judge of the Washington County Court*, 10 Bush, 564.

4. In construing statutes of limitations, courts should follow the literal expression of the legislative will; and neither fraud nor mistake will be allowed to modify this rule. *McDonald's ex'r* v. *Underhill's ex'r*, 10 Bush, 584.

5. Apparently conflicting provisions of a statute must be harmonized and enforced, if practicable. *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

6. The courts will not pass upon a constitutional question and decide a statute invalid, unless a decision upon that very point is necessary to the determination of the cause. (Cooley's Constitutional Limitations, 160, 163; 19 Ind., 287; 9 Ohio St., 373.) *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

7. A legislative enactment will be upheld unless clearly unconstitutional. (McReynolds v. Smallhouse, 8 Bush, 447; 9 B. Mon., 513.) *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

8. Sec. 3, art. 2, chap. 47, Rev. Stat., for the protection of married women who have been deserted by their husbands, was intended as a substitute for the common law, and not as merely cumulative; and must be liberally construed, to promote the object of its enactment. *Hannon* v. *Madden*, 10 Bush, 664.

9. Where the legislature grants the power to tax, it must be exercised in strict conformity to the terms of the grant, and a material departure will be fatal. (Campbell Co. Court v. Taylor, 8 Bush, 206; Dillon on Municipal Corporations, 104.) *Bowling Green & Madisonville R. R. Co.* v. *Warren Co. Court*, 10 Bush, 711.

10. What the law requires to be done for the protection of the tax-payers is mandatory, not directory. (Clark v. Crane, 5 Mich.) *Bowling Green & Madisonville R. R. Co.* v. *Warren Co. Court*, 10 Bush, 711.

11. An act creating a corporation, with the powers and privileges of another corporation formerly created, by reference, without setting them forth, should be construed strictly against the corporation where the rights of others are affected. *Bowling Green & Madisonville R. R. Co.* v. *Warren Co. Court*, 10 Bush, 711.

12. By the words "county court," is generally understood a court presided over by the county judge alone. But, in laying the county levy, making appropriations, etc., the justices of the peace are associated with the judge. *Bowling Green & Madisonville R. R. Co.* v. *Warren Co. Court*, 10 Bush, 711.

CONSTRUCTIVE SERVICE.

See APPEALS; and LIMITATION. See *Salter* v. *Dunn*, 1 Bush, 311; *Beazley* v. *Maret, &c.*, 1 Bush, 466.

CONTEMPTS.

1. The power of the legislative department to interfere with the manner in which the judicial department shall protect itself against insults and indignities, although denied (16 Arkansas, 384) or doubted (19 Wallace, 510) elsewhere, "remains an open question in Kentucky, and we intend in this case so to leave it." *In re Robert W. Woolley*, 11 Bush (April 9, 1875).

2. When a contempt is committed in the presence of the court, notice to the offender is not usually essential. (7 Wallace, 372.) And in such a case, it is indifferent whether the offensive language be spoken openly or be presented to the court in a written or printed document. (19 Howard, 13.) *In re Robert W. Woolley*, 11 Bush (April 9, 1875).

3. To incorporate into briefs or petitions for rehearing which are filed in open court and addressed to the court, contemptuous, scandalous, or insulting matter, is to commit in open court an

act constituting a contempt. *In re Robert W. Woolley*, 11 Bush (April 9, 1875).

4. An order of a court is specific enough, which requires an attorney to show cause why he should not be punished for contempt—in using, in a petition for rehearing filed in open court, language not only disrespectful but insulting to the court; and in filing in open court a "statement," which, whilst disclaiming intentional disrespect to the court in using the offensive language in the petition for rehearing, reiterates some of the most offensive charges and imputations contained therein. *In re Robert W. Woolley*, 11 Bush (April 9, 1875).

CONTRACTS.

I. Acknowledgment to take out of the statute of limitations.
II. Breach and performance.
III. Construction.
IV. Validity of, and what will constitute.

I. ACKNOWLEDGEMENT TO TAKE OUT OF THE STATUTE OF LIMITATIONS.

1. A new promise to pay a debt barred by the statute of limitation must be express, or an unqualified acknowledgment that the debt is a subsisting debt, which the party is willing to pay; and this promise or acknowledgment must be to the party or his agent. *Trousdale's adm'r* v. *Anderson*, 9 Bush, 276.

2. A new promise or unqualified acknowledgment *to a stranger* will not take the case out of the statute, or constitute a good cause of action. *Ibid*, 276.

3. An unqualified acknowledgment, without more or less, will imply a promise to pay, and take the case out of the statute of limitations. *Warren* v. *Perry*, 5 Bush, 447.

4. Whether a promise to pay in cattle or horses implied an unconditional promise to pay, should have been left to the jury. *Same*, 447.

II. BREACH AND PERFORMANCE.

1. Where there is an absolute promise, upon a valuable consideration by one party, to bequeath or devise to another a certain and definite legacy or estate, compensation may be recovered for a breach of the contract or agreement. (Mason v. Mason, 3 Bush, 35; Smith v. Smith, 5 Bush, 625; Myles'

ex'r v. Myles, &c., 6 Bush, 237; Redfield on Wills, part 2, 281–2.) *McGuire* v. *McGuire*, 11 Bush (April 17, 1875).

2. Before it can be decided whether an agreement has been in part performed, it must be ascertained whether the plaintiff and defendant agreed, and what were the terms of the agreement. Such proof can only be established by written evidence. *Holtzclaw, &c.* v. *Blackerby*, 9 Bush, 40.

3. Contracts for the conveyance of lands, not evidenced by any writing, must be rescinded, although each party cannot be put in his original condition. *Holtzclaw, &c.* v. *Blackerby*, 9 Bush, 40.

4. A contractor, having a valid and binding contract, may recover damages against the city when his contract has been violated, or when he has suffered loss by the neglect of the corporation to discharge some duty with reference to the contract of which the contractor is not required to take notice. *Murphy* v. *City of Louisville*, 9 Bush, 189.

5. Damages not accrued at the time of trial, can not be recovered by the plaintiff when, as in this case, the contract declared on will admit of an indefinite number of actions in case the alleged breach shall be continued. *Keith's ex'r, &c.* v. *Hinkston*, 9 Bush, 283.

6. When there exists a legal duty to perform an act, the law will imply a promise to do it; and privity of contract exists between him who should perform, and all who have a right to demand performance. *United Society of Shakers* v. *Underwood, &c.*, 9 Bush, 609.

7. Readiness and offer to deliver the one hundred and fifty cords of wood, and the refusal of the purchaser to receive it, do not constitute performance of the contract. The seller might have set apart the wood for the purchaser, as near to the place of delivery as practicable, and then recovered the contract price, upon the refusal of the purchaser to receive it; or sold it with due precaution, and sued for and recovered the difference between the price received and contract price; or have kept the wood, and recovered the difference between the value at the time and place of delivery, and the contract price. *Webber* v. *Minor*, 6 Bush, 463.

III. CONSTRUCTION.

1. Taking possession of a house built by contract is not an acceptance of the work as done. *Escott & Son* v. *White, &c.*, 10 Bush, 169.

2. One doing work, under an agreement, though defectively, may recover on a *quantum meruit.* (Morford v. Ambrose, &c. 3 J. J. Marsh., 688; Morford v. Mastin, 6 Mon., 609.) *Escott & Son* v. *White, &c.*, 10 Bush, 169.

3. Damages sustained by the employer, by reason of the breach of contract, may be deducted from the amount claimed on a *quantum meruit. Escott & Son* v. *White, &c.*, 10 Bush, 169.

4. Generally no recovery can be had on a *quantum meruit,* if a condition precedent has not been complied with; but if the defendant completes the contract, thus preventing the plaintiff from doing so, a recovery may be had. *Escott & Son* v. *White, &c.*, 10 Bush, 169.

5. Though a stipulated contract exclude extra work unless ordered in writing, if extra work be done it will be regarded as an independent contract, for which a recovery may be had. *Escott & Son* v. *White, &c.*, 10 Bush, 169.

6. Profits which are the direct and immediate fruits of the contract violated, are part and parcel of it, and must have been contemplated when it was entered into. *Elizabethtown & Paducah R. R. Co.* v. *Pottinger & Bro.*, 10 Bush, 185.

7. Profits growing out of the execution of the work to be done, as the building of a house, come within this rule; and in all such cases the contractor, who has been wrongfully prevented from completing the work, may recover such profits as, according to the usual course of things, he would otherwise have realized. (7 Cushing, 516; 13 Howard, 307; 6 McLean, 612; Thompson v. Jackson, Owsley & Co., 14 B. Mon., 92.) *Elizabethtown & Paducah R. R. Co.* v. *Pottinger & Bro.*, 10 Bush, 185.

8. A contractor, compelled to abandon his contract by the conduct of his employer, may claim and prove his prospective profits as part of the damages. *Elizabethtown & Paducah R. R. Co.* v. *Pottinger & Bro.*, 10 Bush, 185.

9. A contractor did not forfeit his right to the fifteen per cent. retained by his employer, when he was driven from his work by

the arbitrary conduct of the company's agents. *Elizabethtown & Paducah R. R. Co.* v. *Pottinger & Bro.*, 10 Bush, 185.

10. One obtaining money without right, is under an implied obligation to refund it. *Garrott* v. *Jaffray & Co.*, 10 Bush, 418.

11. A road corporation, abandoning a material part of its road, forfeits its charter. (6 Iredell, 456; 11 Vt., 431; 23 Wend., 254.) *Kenton Co. Court* v. *Bank Lick Turnpike Co.*, 10 Bush, 529.

12. No statute will be considered to operate retroactively, unless the nature of the case or the language used shows that it was so intended to operate. (Potter's Dwarris on Statutes and Constitutions, 162; Cooley's Constitutional Limitations, 370.) *Cumberland & Ohio R. R. Co.* v. *Judge of Washington Co. Court*, 10 Bush, 564.

13. Covenants to furnish eight barrels of whisky, on or before a particular date, did not pass title. There must be an actual or constructive delivery. *May, &c.* v. *Hoaglan*, 9 Bush, 171.

14. "$600. Due to P——— six hundred dollars, borrowed money, with interest, &c. D. R. B., Pres't of the Hen. Coal Co." *Held* D. R. B. to be personally liable. *Burbank* v. *Posey's adm'r*, 7 Bush, 372.

15. Taking stock in a corporation creates a contract to pay for it in the mode prescribed by the charter. *Gill's adm'x* v. *Ky. & Col. Gold and Silver M. Co.*, 7 Bush, 635.

16. Where parties deliberately put their engagements into writing, in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole agreement of the parties, and the extent and manner of it, were reduced to writing. (Greenleaf on Evidence, sec. 275; 16 B. Mon., 6.) *McKegney, &c.* v. *Widekind & Co.*, 6 Bush, 107.

17. Parties are estopped from denying statements contained in written contracts, without allegation of fraud or mistake. *Rau & Rieke* v. *Boyle & Boyle*, 5 Bush, 253.

18. Parties who agreed to ship tobacco to market, and secure permits during the war, for one-half the profits, not stipulating to pay any part of the losses, are not liable. *Same*, 253.

19. "It is expressly understood by the parties hereto that on final distribution of Peter Smith's estate, he *intends* to make

Noah Smith's children equal in all things with Lee C. Smith," bound Peter Smith to make said children equal in the distribution of his estate with L. C. S.; and although the agreement was made with Nancy, yet her children could enforce it in equity. *Smith* v. *Smith, &c.*, 5 Bush, 625.

20. Sale of goods and delivery of invoice to purchaser, his acceptance received in payment and goods packed, vested title in purchaser, subject to seller's lien *in transitu*, etc.; and failing to deliver the goods, the vendor liable in damages. The measure thereof settled. *Barker & Co.* v. *Mann, Bennett & Co.*, 5 Bush, 672.

21. The purchaser cannot recover on account of loss of profits on a resale in another market; but necessary expenses, time and trouble in replacing the goods, and advance in price—or that the purchase was made to comply with a contract of sale of them, and vendor was informed of it—are matters to enter into the question of damages. *Same*, 672.

22. "Louisville, June 29, 1866.

"I have this day deposited with C. N. Warren & Co. ten thousand dollars in American gold coin, and received fifteen thousand dollars in currency, and on demand I am to have returned to my order ten thousand dollars in American gold coin, by payment of fifteen thousand dollars in currency.

"Witness our hands. W. H. STOKES,
C. N. WARREN."

Held—that Warren undertook to return the gold coin on demand, but that Stokes was not bound to return the currency on demand of Warren. *Stokes* v. *Warren*, 3 Bush, 338.

23. Vendor covenanted that if the slave ran away, he would refund $500 of the purchase money. The slave ran away in 1864, and made his escape, six years after his delivery. His escape being one of the events caused by the war, no action could be maintained on account of the escape. Neither party could have contemplated the war and its consequences. *Brown's ex'x* v. *Hawkins' ex'x*, 3 Bush, 558.

24. "Twelve months after date, the president and directors of the Hustonsville, &c., Turnpike Co., will pay L. Yowell $1,200, for value rec'd, etc.

"Signed: E. J. DODD, *Pres.*,
"(And four others)."

Held—that the corporation was alone responsible, *Yowell* v. *Dodd, &c.*, 3 Bush, 581.

25. "Twelve months after date, the president, by order of the board of the Hustonsville, &c., Turnpike Co., promise to pay M. Caphart $350.

"Signed: E. J. DODD, *Pres.*,
"(And five others)."

Held—that the parties intended to impose a personal liability on themselves for the debt, and not to bind the corporation. *Caphart* v. *Dodd, &c.*, 3 Bush, 584.

26. B. sold a horse, with general warranty of title, and special guaranty that his vendees should not be disturbed in his possession by the military authorities because of a brand on the shoulders of the horse. Purchasers sold the horse; and he was taken from their vendee by soldiers, and retained by officer in command, and they refunded purchase price to their vendee. Before they can recover on the general warranty against B., they must show that their vendee was evicted by superior title; and to authorize a recovery on the special guaranty, it must appear that they gave such a guaranty, and because thereof had refunded the money. *Boyd* v. *Day & Gorrell*, 3 Bush, 617.

27. J. B. J. sold to S. a tract of land, by deed which he acknowledged and retained, and agreed to deliver to S., for $2,000, on Dec. 25, 1863. *Held*—that time in such a contract was of its essence, and the money not having been paid on the day, the contract was not enforceable. *Jones* v. *Noble, &c.*, 3 Bush, 694.

28. Renewal of a note is not a satisfaction of the debt. It is only a change of the evidence. *Lowry* v. *Fisher, &c.*, 2 Bush, 70.

29. On a contract to pay "as soon as able," a judgment and execution will be the best test of the defendant's ability to pay. *Cecil* v. *Welch*, 2 Bush, 168.

30. Vendee executed a note for part of purchase price of a tract of land, and stipulated to have the privilege of extending time of payment, as long as he chose, by paying the interest thereon annually at six per cent. *Held*—that he had the right to extend the time of payment during his life, but the privilege could not be extended by him to another. *Maupin, &c.* v. *McCormick*, 2 Bush, 206.

31. A contract invalid where made, cannot be enforced here. *Archer* v. *National Ins. Co.*, 2 Bush, 226.

32. See CARRIERS. Also, *Adams Express Co.* v. *McDonald*, 1 Bush, 32.

33. M. & M. purchased a stock of goods, and agreed in consideration thereof to pay the debts of M. & B. *Held*—that they were directly liable to the creditors of M. & B. on the obligation executed by the purchasers. *Garvin & Co.* v. *Mobley, &c.*, 1 Bush, 48.

34. Parol contracts respecting lands are not void, but may be an available defense in bar of an action to recover the land. *Cornellison* v. *Cornellison*, 1 Bush, 149.

35. Goods sold and delivered to one, upon the credit of another, binds the latter, although oral; such promise is not within the statute of frauds. *Leisman, &c.* v. *Otto*, 1 Bush, 225.

IV. VALIDITY OF, AND WHAT WILL CONSTITUTE.

1. See CARRIERS (9 Bush, 688); CONSIDERATION; INSURANCE; and MARRIED WOMEN.

2. An infant may ratify his contract, because it is voidable only; but a married woman must make a new contract after becoming discovert, for the reason that the first contract is absolutely void, and never had any legal existence so far as it affected her rights. *M. P. Robinson, &c.* v. *B. F. Robinson's trustee, &c.*, 11 Bush (April 20, 1875).

3. A bid was made for certain turnpike stocks, authorized to be sold by commissioners for the State; the bid was not accepted as made, but a proviso was attached, of which the bidder had notice. He modified his bid accordingly, and the commissioners had notice of such acceptance. This was such meeting of the minds of the parties in agreement at the same time to the same thing, as made the *aggregatio mentium* essential to a contract. *Baldwin, &c.* v. *Commonwealth, &c.*, 11 Bush (Oct. 15, 1875).

4. The contract was completed and the title passed, and the rights of the parties became fixed, when notice of the acceptance of their modified terms was received by the board of commissioners. (Duncan v. Lewis, 1 Duvall, 183; Thompson v. Gray, 1 Wheaton, 75; and Crawford v. Smith, 7 Dana, 61.) *Baldwin, &c.* v. *Commonwealth, &c.*, 11 Bush (Oct. 15, 1875).

5. On impairing the obligation of contracts. (Constitution of U. S.; Constitution of Ky.; Blair v. Williams and Lapsley v. Brashear, 4 Littell, 66.) *Baldwin, &c.* v. *Commonwealth, &c.*, 11 Bush (Oct. 15, 1875).

6. Where a person injured by a criminal act was himself the foreman of the grand jury which indicted one for obtaining mules under false pretences, and afterwards entered into negotiations with the accused for his own indemnity for losses resulting from the criminal act, and the prosecution was suddenly abandoned, although threats were made that it would be carried on vigorously unless indemnity were given, it required but slight evidence to satisfy the court that there was an agreement to compound the offense, and that the prosecution was set on foot to bring the accused to terms. A note was given, with personal and mortgage security,—the above being the real consideration. *Held*—that the law will not enforce such contracts, and a suit upon the note and mortgage was properly dismissed. *Kimbrough* v. *Lane, &c.*, 11 Bush (Nov. 27, 1875).

7. An agreement to dismiss a prosecution, or do other thing by which the redress of the public wrong is to be hindered or defeated, is in violation of the rights and policy of the Commonwealth, and cannot be enforced. (Gardner v. Maxey, 9 B. Mon., 90; Swan, &c. v. Chandler and Phillips, 8 B. Mon., 98.) *Kimbrough* v. *Lane, &c.*, 11 Bush (Nov. 27, 1875).

8. The courts will not enforce a contract to pay money to suppress a prosecution for obtaining goods under false pretenses. If money is paid upon such a contract, the courts will not aid in recovering it back. They will leave both parties in the exact position in which they have placed themselves. *Kimbrough* v. *Lane, &c.*, 11 Bush (Nov. 27, 1875).

9. A party must perform fully a condition precedent before he can maintain a suit on the contract. *Escott & Son* v. *White, &c.*, 10 Bush, 169.

10. An implied contract is created by legal presumption upon a given state of facts. *Garrott* v. *Jaffray & Co.*, 10 Bush, 413.

11. A debt created by an implied contract may be collected by attachment. *Garrott* v. *Jaffray & Co.*, 10 Bush, 413.

12. Courts of equity, like courts of law, will not grant relief to either of two parties *in pari delicto*. (Story's Equity, 298;

11 Mass., 377; Cowper, 792; Bibb v. Bibb, 17 B. Mon., 307; Brookover v. Hurst, 1 Met., 668.) *Marksbury, &c.* v. *Taylor, &c.*, 10 Bush, 519.

13. An executed contract, based upon illicit sexual commerce, cannot be set aside at the instance of the grantor or his heirs-at-law. *Marksbury, &c.* v. *Taylor, &c.*, 10 Bush, 519.

14. An act done or contract made under a mistake of a material fact is voidable and relievable in equity. 10 Bush, 669.

15. But where equal means of information exist, or the fact is equally known to the parties, no relief will be granted. (Story's Equity, 156; Kerr on Fraud and Mistake, 408.) *Western German Savings Bank* v. *Farmers' and Drovers' Bank*, 10 Bush, 669.

16. Plaintiff alleged an individual contract; partnership contract was proven. *Held*—that the failure to allege a partnership liability was not a ground of nonsuit. *Waits* v. *McClure*, 10 Bush, 763.

17. Carriers may limit their common-law liability by special contract made without duress, imposture, or delusion. *Adams Express Co.* v. *Guthrie*, 9 Bush, 78.

18. Contracts for street improvements in cities must be signed and approved in the manner prescribed by their charters and ordinances. *Murphy* v. *City of Louisville*, 9 Bush, 189.

19. Contracts for street improvements not executed in the manner prescribed by the city charter and ordinances, are null and void. Nor is the corporation liable for the value of the work, by reason of any implied promise to pay, upon the idea that the city derived a benefit from it. *Ibid.*

20. Persons dealing with a municipal corporation, the mode of whose action is limited by the charter, must take notice of the restrictions, and see that the contract is made in the manner authorized by the charter. *Ibid.*

21. Persons dealing with a municipal corporation through its officers are bound to take the same notice of its laws and ordinances that a citizen of the State is with reference to legislative enactments. *Ibid.*

22. In an action on a covenant to pay $1,000 "if the sale is confirmed," the petitioner should have alleged that he had confirmed the sale, and stated the facts to show he had confirmed

it, or have stated facts showing a sufficient legal reason for not doing so. Failing to make these allegations, the petition did not contain facts sufficient to constitute a cause of action. *Johnson* v. *Stokes*, 9 Bush, 279.

23. Property cannot be vested or held so as not to be subject to the owner's debts. Bond for land, providing that it should not be liable for vendee's debts created theretofore, invalid. *Carlin's adm'r* v. *Carlin, &c.*, 8 Bush, 141.

24. When the deed was executed, a parol agreement was made that vendor was to hold possession of the land during his life. *Held*—to be valid and enforceable. *Carpenter, &c.* v. *Carpenter*, 8 Bush, 283.

25. Before the maturity of a note payable in gold, the obligor paid principal and interest to date in legal tender notes, when obligor agreed to pay the premium on the note at its maturity. *Held*—to be valid and binding. *Murray* v. *Meagher*, 8 Bush, 574.

26. Borrower of money agreed that unless it should be refunded within twelve months, a mare purchased therewith should be the property of the lender, to be delivered to him on demand. The money not being refunded as agreed, the mare was the property of the lender. *Buffington* v. *Ulen*, 7 Bush, 231.

27. An implied contract may exist for clothing and nursing. The statute requiring express contract for diet does not apply. *Thomas, &c.* v. *Arthur*, 7 Bush, 245. (Chap. 106, Gen. Stat., art. 3, sec. 1.) Said statute does not apply to boarding, etc., furnished to an idiot. See *Combs* v. *Beatty*, 3 Bush, 613. Nor to hire of servants for one gratuitously entertained. *Hurst* v. *Stanberry*, MS. opinion, 1855.

28. A parol promise to pay the debt of another to a third party, for a valuable consideration, is binding. To have lien removed on property purchased, is sufficient to uphold the promise. *Hodgkins* v. *Jackson*, 7 Bush, 342.

29. A contract for sale of brandy made and sold in violation of revenue laws of Congress is void. *Creekmore, &c.* v. *Chitwood*, 7 Bush, 317.

30. Statute of frauds and perjuries does not apply to an agreement with one to pay a debt which he owes to another. *Spadone* v. *Reed, &c.*, 7 Bush 455.

31. An act creating a new county imposing obligations on the new county or districts thereof to pay part of the debts of the county from which the new county or district was taken, is binding on the new county, and can be enforced by suit. *Bracken Co. Court* v. *Robertson Co. Court*, 6 Bush, 69.

32. Contracts not enforceable in the State where made, will not be enforced in another State. *Ford* v. *Buckeye Ins. Co.*, 6 Bush, 133.

33. Compensation may be recovered by a party who has advanced money or performed valuable services, in faith of a legacy, provided it is proved that there was a promise upon such consideration to leave the party a certain and definite legacy. In this case it is not a contract within the statute of frauds. The right of action does not rest on the power to specifically enforce the contract, but results from the non-performance of the agreement to compensate the plaintiff for his services by testamentary provision. The agreement does not come within the provision of the statute relating to promises not to be performed within a year. Nor is it barred by limitation, for no right of action accrued till the death of testator. *Myles' ex'rs and devisees* v. *Myles*, 6 Bush, 238.

34 On contracts for gold, judgment should be rendered for the gold or its value in currency. *Glass* v. *Pullen*, 6 Bush, 346.

35. It is essential to the validity of a contract that it should be mutual, and that there be parties to it. *Goff, &c.* v. *Winchester College*, 6 Bush, 443.

36. Confederate currency was not a vicious consideration. *Rivers* v. *Moss' assignee*, 6 Bush, 600.

37. A private citizen secured the release of tobacco during the war, which had been wrongfully seized by a Federal officer; and owner agreed to pay him one-half, after deducting from the proceeds a sum due thereon. *Held*—1. That the contract was not contrary to law nor against public policy; 2. That it was not champertous; and 3. That the compensation was not exorbitant. *Rau & Rieke* v. *Boyle & Boyle*, 5 Bush, 253.

38. Contracts made within Confederate States during the war, for Confederate currency, are enforceable. (1 Bush, 629.) *Rodes* v. *Patillo, &c.*, 5 Bush, 271.

39. Oral antenuptial contract, that neither party was to ever claim or interfere with the property of the other, binding between the parties and all volunteers under them. *Southerland* v. *Southerland's adm'r*, 5 Bush, 591.

40. When party enters into a contract forbidden by law, he cannot recover on it, nor will the law imply one for him. *Todd* v. *Caplinger*, 4 Bush, 139.

41. If any part of the consideration be unlawful, the contract is void. If there is a covenant to do several things, part unlawful and part lawful, the latter is good and may be enforced. *Same*, 139.

42. An agreement by the father to convey, at his death, a tract of land to his son, on consideration that the son live with and take care of him during his life, being only in parol, cannot be enforced; but the son, if he has performed his part of the agreement, cannot be ejected from the land until he is compensated for his services, etc., and has a lien on the land therefor. *Speers, &c.* v. *Sewell, &c.*, 4 Bush, 239.

43. Contract made by telegrams is binding. *Calhoun* v. *Atchison, &c.*, 4 Bush, 261.

44. P. McBee in writing consented to the sale of the expected interest in his land, to pay a debt that his daughter Henrietta made, and agreed to give her vendee as much land as to any of the balance of his children; and thereby divested himself of his right of disposing of the designated portion of the land; and the purchaser is entitled to an equal interest in his land, by virtue of the contract. *McBee* v. *Myers, &c.*, 4 Bush, 356.

45. If the debtor is released by the agreement of another party to pay his debt, the other becomes bound for his own debt. This promise is not within the statute, and it is not necessary that the release or agreement be in writing. *Day* v. *Cloe, &c.*, 4 Bush, 563.

46. A parol promise by one child, in consideration of land conveyed by the father, to pay the other children so much at the father's death, binding; and the statute of limitations will not begin to run until after the father's death. *Mason, &c.* v. *Mason, &c.*, 3 Bush, 35.

47. Contracts may be contained in several instruments, which, if executed at the same time, between the same parties, and

relation to the same subject-matter, will constitute but one contract. Where a party executed a note, and accepted a deed simultaneously with it, covering the same matter, the stipulation in the deed, as to the consequences of the failure of the payor of the note to pay the interest, was as binding as if contained in the note. *Parks' ex'r* v. *Cooke*, 3 Bush, 168.

48. Parol contracts not to be performed within a year are not void; and although no suit can be maintained to enforce them, the law implies a promise to pay for the consideration; and the defendant may protect himself against suit until the expiration of the time, and use it for the purpose of reducing the amount of his liability under the implied promise created by law. *Montague* v. *Garnett*, 3 Bush, 297.

49. Two persons purchased property in partnership, and gave a third person as surety on the notes executed therefor. Surety and one of the principals agreed in writing to share the profits and losses of the adventure, without the knowledge of the other principal. Such a contract did not diminish the surety's right to be reimbursed for any amount he might have to pay for his principals. *Lewis* v. *Wright, &c.*, 3 Bush, 311.

50. A contract to pay one a consideration to administer upon the estates of the obligor's father, &c., is valid. *Clark* v. *Constantine*, 3 Bush, 652.

51. An agreement to pay for procuring a substitute, and exempting party from impending draft, binding. *Proctor* v. *Fombelle*, 3 Bush, 672.

52. It is only when unfair concealment or fraudulent conduct induces a party to receive a less sum than is due him, that courts interpose against the compromise of causes of litigation. *Pepper & Watson* v. *Aiken, &c.*, 2 Bush, 251.

53. See COMPOUNDING DEBTS. Also, *Ricketts* v. *Hall & Long*, 2 Bush, 249.

54. As to validity of contracts between citizens of belligerents, see *Leathers* v. *Commercial Ins. Co.*, 2 Bush, 296.

55. A written obligation to collect a soldier's wages, and pay $150 for a horse purchased for use of one of the captain's men, was binding on the captain. *Thompson's adm'r* v. *Coppage*, 2 Bush, 318.

56. Where purchaser of land agrees to pay off note of his vendor, given in part payment for the land, it is a new contract, not within the statute, and binding on purchaser although resting in parol. *Jennings* v. *Crider*, 2 Bush, 322.

57. Knowledge of the illegal purpose for which goods are purchased, will not affect the validity of the contract of sale; but the vendor must participate in the intent to accomplish the illegal act. *Hedges* v. *Wallace*, 2 Bush, 442.

58. Since the legal tender enactment, contracts payable in gold or silver should be specifically enforced. *Hall* v. *Hiles*, 2 Bush, 532.

59. For liability on assignment of note, see title ASSIGNMENT. *Bowman* v. *Curd*, 2 Bush, 565.

60. The evidence was sufficient to authorize a verdict in favor of plaintiff, although the services were rendered in 1864, instead of 1863, as charged. *Gentry* v. *Doolin*, 1 Bush, 1.

61. A promise to pay a debt against an intended wife, for which the creditor had no lien on her estate, is not binding on the husband. *Agnew & wife* v. *Williams*, 1 Bush, 4.

62. Want of stamp does not invalidate a contract. *Hunter* v. *Cobb*, 1 Bush, 239.

63. An agreement to pay money for the supposed or actual influence of another with the military authorities, to allow promisor privileges which he was by law entitled to, is illegal. *Hutchen* v. *Gibson*, 1 Bush, 270.

64. Legislative grant of title of the State to land valid. *Corbin, &c.* v. *Mulligan*, 1 Bush, 297; and one accepting deed from the auditor for the same land, after the legislative grant, will be charged with constructive notice thereof, although at the time the act had not taken effect. *Same*, 297.

65. A receipt, "without prejudice to his rights," of U. S. legal tender notes, is not a legal satisfaction of the debt. *Riley's ex'r* v. *Sharp, &c.*, 1 Bush, 348. The several cases decided by the appellate court of Kentucky, that the legal tender act is unconstitutional, have been overruled by the supreme court of the United States. [EDITOR OF THIS DIGEST.]

CONTRIBUTION.

1. Creditors who have received their *pro rata* of a trust estate, declared and settled as such upon a certain conveyance being set aside as fraudulent, are liable to pay back only their *pro rata* of a sum found necessary to satisfy a balance due by the insolvent debtor as guardian. They cannot be compelled to contribute to make up what is lost by the insolvency or non-residence of part of the creditors. *Roberts and wife* v. *Phillips, &c.*, 11 Bush (March 5, 1875).

2. A surety, against whom a judgment has been recovered, and who has paid the debt, cannot recover as for contribution against his co-surety as to whom the cause of action was barred at the date of the judgment. *Shelton* v. *Farmer*, 9 Bush, 314.

CONVERSION.

1. See SPECIAL DEPOSITS.

2. A judgment for a wrongful conversion of property, against one co-trespasser, even when partly satisfied, will not bar an action against another. (Lovejoy v. Murray, 3 Wallace, 1.) *Shakers* v. *Underwood, &c.*, 11 Bush (Sept. 7, 1875).

3. The purchaser of a mare for a valuable consideration, from one who wrongfully took her from her owner, is not vested with the right of property in her; and the owner can recover her. *Chandler* v. *Fergusou*, 2 Bush, 163.

CONVEYANCES.

See DEEDS.

CONVICTION.

Violation of a criminal law will not justify a judgment of conviction, if the law shall have expired or been repealed before judgment. *Commonwealth* v. *Palmer*, 2 Bush, 570. But see now, sec. 3, art. 1, of "An act to adopt the General Statutes," Gen. Stat., page 137, &c.

CORPORATIONS.

1. As to Municipal Corporations, see TOWNS AND CITIES.

2. As to Attachments against, see ATTACHMENTS.

3. See BANKS (9 Bush, 609); BRIDGES; CITY OF LOUISVILLE; NOTICE; CONSTITUTIONAL LAW; and RAILROADS.

4. The powers of a municipal corporation will be construed most strictly against it, in favor of the public; but will not be so construed, in order to hold it liable to respond to a claim preferred against it by an individual. *Wheatly* v. *City of Covington*, 11 Bush (March 9, 1875).

5. An action brought by a corporation or a non-resident *shall* be dismissed, unless bond for costs be given *before* the commencement of the action. (Gen. Stat., 265.) *Portsmouth F. and M. Works* v. *Iron Hills F. and M. Co.*, 11 Bush (March 18, 1875).

6. Having power by proper proceedings to make street improvements at the exclusive cost of the owners of adjacent property, the General Council of Louisville cannot bind the city to pay for it. *Craycroft, &c.* v. *Selvage, &c.*, 11 Bush (April 16, 1875).

7. The city of Louisville cannot be held liable for street improvements, on the ground that the plaintiffs have expended their labor and money on a street that is now being used by her people. (Murphy v. City of Louisville, 9 Bush, 189.) *Craycroft, &c.* v. *Selvage, &c.*, 11 Bush (April 16, 1875).

8. County courts are not required by law to adjourn each day when they cease to transact business; but may treat the entire time they are in session as one day, and make and sign but one adjourning order. (Dye v. Knox, 1 Bibb, 575.) *Garrard Co. Court* v. *McKee*, 11 Bush (April 21, 1875).

9. By the act of March 1, 1865, incorporating the Kentucky River Navigation Company, the counties along that river were constituted *quasi* private corporations; and in all matters growing out of that act, must be held to the same responsibility as a private corporation: hence, had a right to employ an attorney, and were bound to pay him a reasonable and proper fee for his services; and, the amount of said fee having been ascertained, may be compelled to "levy a tax," under the act of January 12,

1871, to pay same. *Garrard Co. Court* v. *McKee*, 11 Bush (April 21, 1875).

10. Where an attorney's fee against a *quasi* private corporation is not ascertained, and cannot be agreed upon, mandamus is not the appropriate remedy. (Hickman County Court v. Moore, &c., 2 Bush, 108.) *Garrard Co. Court* v. *McKee*, 11 Bush (April 21, 1875).

11. The bondholders of the Louisville, Cincinnati and Lexington Railroad Company did not take, under their mortgages or deeds of trust, a lien upon the earnings of the roads owned by the company; and the company had no legislative authority to pledge such earnings, and did not attempt to do so. *Douglas, &c.* v. *Cline, &c.*, 11 Bush (Nov. 2, 1875).

12. A corporation may maintain an action in its own name on the official bond of one of its officers, if it was executed for the protection of the corporation. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

13. Acceptance of the official bond of a bank cashier need not be by a written memorandum upon the directors' books. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

14. The acceptance of the cashier's bond may be presumed from the fact that the cashier was permitted to enter upon the discharge of his duties. (12 Wheaton, 64; 3 Pickering, 335; 2 Met. Mass., 522; 1 Har. & G., 324; Morse on Banking, 223.) *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

15. Where the sureties in the official bond of a bank cashier covenant that he will perform the duties of his position, and account for all moneys and other valuables that may pass through his hands, no failure of duty thereafter on the part of the directors, short of actual fraud or bad faith, can be deemed sufficient to exonerate them from its performance. *Graves, &c.* v. *Lebanon Nat. Bank*, 10 Bush, 23.

16. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties in the bond of the bank cashier, the sureties are entitled to have these facts disclosed to them. *Graves, &c.* v. *Lebanon Nat. Bank*, 10 Bush, 23.

17. The statement of facts not existing, ignorantly made by one whom the person acting upon the statement has the right

to suppose has informed himself, as well as the concealment of facts known to exist, is a fraud. *Graves, &c.* v. *Lebanon Nat. Bank*, 10 Bush, 23.

18. The cashier of a national bank, never having executed bond, was guilty of fraud and embezzlement, which, by slight diligence, the directors might have discovered. After publication, showing prudent and honest administration of the affairs of the bank, persons who had seen this report became sureties on the cashier's bond, and for his subsequent embezzlements were sought to be held liable thereon. *Held*—that the sureties had a right to believe that the directors, before publishing a statement, had investigated the condition of the bank; and being misled by the misrepresentations of the published statement, were released. *Graves, &c.* v. *Lebanon Nat. Bank*, 10 Bush, 23.

19. The legislature may, upon considerations, grant privileges that no legislature can afterwards, without the consent of the parties, impair or diminish. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Commonwealth*, 10 Bush, 43.

20. A bank, whose charter gives it a lien on its stock, has no such lien until the stockholder becomes indebted to the bank; nor can it extend credit to the stockholder upon the faith of this charter lien, if it knows he has parted with the title to his stock. *Bank of America* v. *McNeil*, 10 Bush, 54.

21. Stock, assignable by transfer on the books of the corporation, may be assigned by delivering the certificate with a written power to the assignee to transfer on the books; and those having notice will be affected. *Bank of America* v. *McNeil*, 10 Bush, 54.

22. Where a bank releases for a time its charter lien on its stock, and within that time the stock is pledged for a debt, after the expiration of the time the lien of the bank will be postponed to the right of the pledgee until the debt is paid. *Bank of America* v. *McNeil*, 10 Bush, 54.

23. Where a bank refused to allow the transfer on its books of stock in accordance with a written power, thereby impairing its value to the owner, he had a right to treat the action of the bank as a conversion of the stock, and to recover its value. *Bank of America* v. *McNeil*, 10 Bush, 54.

24. Where in such case the debt for which the stock was pledged was renewed before the stockholder's note was discounted by the bank, the cashier's knowledge of the original debt and pledge should have put him on inquiry, and he is presumed to have known that the renewal did not, as a matter of law, release the pledge. *Bank of America* v. *McNeil*, 10 Bush, 54.

25. The charter of a private corporation may vest rights in the stockholders which no subsequent legislation can impair. *City of Covington* v. *Covington & Cincinnati Bridge Co.*, 10 Bush, 66.

26. But a charter may be amended in so far as is necessary to accomplish the purpose for which it was obtained. (Fry's executor v. Big Sandy & Lexington R. R. Co., 2 Met., 321.) *City of Covington* v. *Cov. & Cin. Bridge Co.*, 10 Bush, 69.

27. Corporations are ruled by a majority in interest, unless the charter provides otherwise. *City of Covington* v. *Cov. & Cin. Bridge Co.*, 10 Bush, 69.

28. The legislature may empower a corporation to mortgage its property, franchises, etc. *City of Covington* v. *Cov. & Cin. Bridge Co.*, 10 Bush, 69.

29. If the legislative enactment authorizing the corporation to pledge its revenues to raise money be regarded as unconstitutional, after the payment of money on such pledge and the success of the enterprise by reason of the outlay, the chancellor will subject the property to the payment of the pledge. (28 Penn., 339; 49 Maine, 492; 35 Vt., 536.) *City of Covington* v. *Cov. & Cin. Bridge Co.*, 10 Bush, 69.

30. A corporation chartered in one State is granted certain powers in a second: *Held*—that an amendment to the charter in the first State is not invalid, because in conflict with some law of the second. *City of Covington* v. *Cov. and Cin. Bridge Co.*, 10 Bush, 69.

31. The Legislature of Kentucky incorporated a bridge company, but withheld the power of organization until the Ohio Legislature should confirm the act of incorporation, which was afterwards done. *Held*—that the State of Kentucky had the power to create such a corporation, with any right not unconstitutional; and it was essentially a Kentucky corporation. Similar legislation need not be obtained from each State before

any amendment can be made to the original charter, or additional power conferred. (12 Wallace, 65.) *City of Covington* v. *Cov. & Cin. Bridge Co.*, 10 Bush, 69.

32. The acceptance of a charter amendment by a corporation, or the appointment of an agent, need not be entered on the books of the corporation; such acceptance may be inferred. Parol evidence may be introduced to show the vote for the agent or assent to the amendment, unless the charter forbids it. (Angell and Ames on Corporations, 313.) *City of Covington* v. *Cov. & Cin. Bridge Co.*, 10 Bush, 69.

33. An agent of a corporation, acting within the scope of his authority, binds his principal, as if a natural person. *City of Covington* v. *Cov. and Cin. Bridge Co.*, 10 Bush, 69.

34. A municipal corporation, owning stock in a bridge company, appointed two persons to cast its vote in a meeting of the stockholders. *Held*—not essential that the records of the council or of the bridge company should have shown how the agents voted. *City of Covington* v. *Cov. and Cin. Bridge Co.*, 10 Bush, 69.

35. Want of authority on the part of a county court to subscribe for stock in a corporation is no reason for such corporation refusing to deliver the stock, after receiving the money on the subscription. *Mercer Co. Court* v. *Springfield, Maxville & Harrodsburg Turnpike Co.*, 10 Bush, 254.

36. A county court subscribed for stock in a turnpike company, the money to be used in building a bridge. *Held*—the company had the right to accept the conditional subscription, and the subsequent destruction of the bridge did not affect the subscription, but was the company's loss. *Mercer Co. Court* v. *S., M. & H. Turnpike Co.*, 10 Bush, 254.

37. If a corporation can rely upon lapse of time against a stockholder who merely demands the evidence of title to his stock (a question not decided), the statute of limitations will not begin to run until the stockholder is notified that his title to the stock is disputed. *Mercer Co. Court* v. *S., M. & H. Turnpike Co.*, 10 Bush, 254.

38. Limitation runs against a stockholder as to dividends on his stock which have been appropriated by the corporation. *Mercer Co. Court* v. *S., M. & H. Turnpike Co.*, 10 Bush, 254.

39. Every corporation must fulfill the object of its creation, and not voluntarily render itself unable to do so. *Kenton Co. Court* v. *Bank Lick Turnpike Co.*, 10 Bush, 529.

40. A road corporation abandoning a material part of its road, forfeits its charter. (6 Iredell, 456; 11 Vt., 431; 23 Wend., 254.) *Kenton Co. Court* v. *Bank Lick T. P. Co.*, 10 Bush, 529.

41. The acceptance of a charter amendment may be proved by showing performance of acts authorized only by the amendment. *Kenton Co. Court* v. *Bank Lick T. P. Co.*, 10 Bush, 529.

42. A road company cannot change its located road at will; but must keep it in repair, unless prevented by some *vis major*. *Kenton Co. Court* v. *Bank Lick T. P. Co.*, 10 Bush, 529.

43. General authority to a railroad corporation to condemn a site for the road-way, will not authorize the condemnation of a highway. (4 Cushing, 63.) An abandonment of the road to the railroad will be presumed voluntary, and without the assent of the State. *Kenton Co. Court* v. *Bank Lick T. P. Co.*, 10 Bush, 529.

44. Where an act is susceptible of two constructions, that which is lawful should be preferred. *Kenton Co. Court* v. *Bank Lick T. P. Co.*, 10 Bush, 529.

45. A corporation accepting the benefits of a charter amendment must take it with its burdens also. (32 Md., 29; 20 Eng. Com. Law Rep., 85.) *Kenton Co. Court* v. *Bank Lick T. P. Co.*, 10 Bush, 529.

46. All charters and grants of or to corporations, etc., shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed. (Act of February 14, 1856.) *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

47. Notwithstanding a provision for "perpetual succession" in a charter, the Legislature had constitutional power to amend it, provided the amendment did not impair a previously vested right. *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

48. After an election, the judge of the Barren county court, upon a given contingency, subscribed for stock in a railroad company on behalf of the county. But before the subscription was

actually made, an amendment to the charter of the railroad company, imposing additional conditions upon the issue and delivery of county bonds to the company, was rejected. *Held*—that the amendment is constitutional and binding on the company, and it is not entitled to the county bonds except on the conditions imposed by the amendment. *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

49. The power conferred, in a company's charter, on a county court to subscribe for stock, may be modified or restrained by the Legislature. The mere vote to subscribe did not of itself form such a contract with the railroad company as would be protected by article 1, section 10, of the Constitution of the United States. Until the subscription was actually made, the contract was unexecuted. *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

50. An order of the county court directing the judge to subscribe for stock, upon contingencies therein named, did not of itself amount to a subscription. *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

51. The county judge's voting in meetings of the stockholders, did not bind the county to the subscription, as by ratification or estoppel. *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

52. Apparently conflicting provisions of a statute must be harmonized and enforced if practicable. *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

53. Officers of a corporation are under an implied contract to act carefully and honestly in managing its affairs; and a suit by stockholders to settle a trust in the hands of the assignee of a corporation may be joined with an action against its officers for negligence and fraudulent management of its affairs. In such suit, the assignee, being a necessary party, may be made defendant, if he will not sue as plaintiff. *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

54. Suit against the officers of a corporation for misconduct, should be brought by the corporation, unless it be in the hands of such officers, when the stockholders may sue. The stockholders can sue only in equity. (2 Atkyns, 400; 3 Paige, 230.) *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

55. An act creating a corporation, with the powers and privileges of another corporation formerly created, by reference without setting them forth, should be construed strictly against the corporation, where the rights of others are affected. *Bowling Green & Madisonville R. R. Co.* v. *Warren Co. Court*, 10 Bush, 711.

56. Contracts for street improvements in cities must be signed and approved in the manner prescribed by their charters and ordinances. *Murphy* v. *City of Louisville*, 9 Bush, 189.

57. Contracts for street improvements not executed in the manner prescribed by the city charter and ordinances, are null and void. Nor is the corporation liable for the value of the work, by reason of any implied promise to pay, upon the idea that the city derived a benefit from it. *Ibid.*

58. Persons dealing with a municipal corporation, the mode of whose action is limited by its charter, must take notice of the restrictions, and see that the contract is made in the manner authorized by the charter. *Ibid.*

59. Persons dealing with a municipal corporation, are bound to take the same notice of its laws and ordinances that a citizen of the State is with reference to legislative enactments. *Ibid.*

60. A contractor, having a valid and binding contract, may recover damages against the city when his contract has been violated, or when he has suffered loss by the neglect of the corporation to discharge some duty with reference to the contract of which the contractor is not required to take notice. *Ibid.*

61. A director of a railroad company purchased the railroad belonging to his corporation, at a judicial sale thereof, without the consent of the corporation, and without the permission of the chancellor by whom the sale was decreed. *Held*—that the corporation has a right to have its road surrendered to it, upon placing the director who purchased it *in statu quo*. *Covington & Lex. R. R. Co.* v. *Bowler's heirs*, 9 Bush, 468.

62. Being a fiduciary, the director could not purchase the property of the corporation, even at a judicial sale, without its consent, or without the permission of the chancellor by whom the sale was decreed. *Covington & Lexington Railroad Company* v. *Bowler's heirs, &c.*, 9 Bush, 468.

63. A director is a trustee for the corporation; and it is a breach of trust on his part to create any relation between himself and the trust-property, whereby it becomes his interest to subserve his individual interests at the expense or to the injury of such beneficiary or to the trust property. *Ibid.*

64. Diverting the means of the corporation from paying interest on preferred mortgage claims in suit, evidenced an intention on the part of the directors to bring the road to sale. *Ibid.*

65. It is not a good defense on the part of such purchaser, that his co-directors participated in and approved of the purchase by him; because it is not denied that he exercised over such co-directors a controlling influence. *Ibid.*

66. From the time he concluded to prepare for the purchase of the road, the director's personal interests became antagonistic to that of the corporation, and he ought to have ceased to act as a director. *Ibid.*

67. The corporation is not estopped by acts of individual stockholders, who, being admitted as parties to a suit wherein the corporation was a party, filed pleadings therein for themselves only, and not for the corporation. The corporation is not bound or estopped by the action of the court on such pleadings, although they may have set up the same acts as grounds for relief that are afterward relied upon by the corporation in another suit. *Ibid.*

68. The insolvency of a corporation is no defense against its suit to recover its property, or to fasten a trust upon the director of the company who wrongfully became the purchaser of such property, at a judicial sale thereof. *Ibid.*

69. The charter of a private corporation is not repealed or modified by a general act relating to a different subject. *Tyler's ex'r* v. *Elizabethtown & Paducah R. R. Co.*, 9 Bush, 510.

70. It will not be presumed that the provisions of the charter were disregarded, when it is not alleged in the pleadings and does not appear in the record. *Ibid.*

71. General legislation does not usually apply to or control special acts. *Ibid.*

72. A mandamus will not lie against a private corporation, or its officers, having no right to exercise any power of a public

nature. *Cook* v. *College of Physicians and Surgeons, &c.*, 9 Bush, 541.

73. Mandamus is confined in its application to certain classes of persons; and the courts cannot extend it to others. *Ibid.*

74. The College of Physicians and Surgeons of the City of Louisville cannot be reached by mandamus. *Ibid.*

75. Every stockholder contracts that the will of the majority shall govern, in all matters within the limits of the act of incorporation. *Dudley* v. *Kentucky High School*, 9 Bush, 576.

76. An irregularity in the vote of the directors, by which the purchase was ordered, does not authorize the chancellor's interference to prevent its consummation. *Dudley* v. *Ky. High School*, 9 Bush, 576.

77. Stockholder in corporation competent witness in behalf of the company. *Digby* v. *Kenton Iron Co.*, 8 Bush, 166.

78. Subscriptions of stock in corporations by county courts must be by order of court, and not by an agent out of court; and must be made when a majority of the justices were present. *Shelby Co. Court* v. *Cumberland & Ohio R. R. Co.*, 8 Bush, 209, and *Mercer and Garrard County Courts* v. *Ky. River Navigation Co.*, 8 Bush, 300.

79. The obligation to refund to citizens of Mercer county stock subscribed and paid by them, under the act to consolidate Kentucky University and Transylvania University (Sess. Acts, 1865, page 67), applied only to such subscribers as were at the time of the passage of the act permanent residents of Mercer county. *McAfee, trustee, &c.* v. *Kentucky University*, 7 Bush, 135.

80. The act to subject officers of a turnpike road to a fine for passing or causing to be passed through any of its toll-gates, without pay, any cattle or teams, &c., *held* to be valid. *Wilson* v. *Commonwealth for use of Klette*, 7 Bush, 536.

81. Taking stock in a corporation creates a contract, express or implied, to pay for it in the mode prescribed by the charter; and, whether it was properly organized or not, cannot be questioned collaterally. The remedy against a delinquent subscriber is to enforce payment by judgment, and not by forfeiture or sale of the stock. *Gill's adm'x* v. *Ky. & Colorado Gold and Silver Mining Co.*, 7 Bush, 635. (2 Met., 314.)

82. Subscriptions before incorporation, not mutually binding on the subscribers, are not enforceable. *Goff, &c.* v. *Winchester College*, 6 Bush, 443.

83. A corporation, as a legal entity for the purposes of jurisdiction, may have the status of a citizen in the Federal courts, under sec. 2, art. 3, U. S. Constitution; but this does not make a corporation a citizen for all the purposes and fundamental rights of a citizen as declared in sec. 2, art. 4, U. S. Constitution. *Phœnix Ins. Co.* v. *Commonwealth*, 5 Bush, 68.

84. When unanimity is necessary to make an order on the books of a corporation, it should be presumed that it was so made, although the record does not so state. *City of Lexington* v. *Headley, &c.*, 5 Bush, 508.

85. The Louisville Orphans' Home Society was, at the time of Isaac Cromie's death, in 1865, a legal corporation, and qualified recipient of his testamentary bounty. *Cromie's heirs* v. *Louisville Orphans' Home Society, &c.*, 3 Bush, 365.

86. So much of his real estate as was devised to the House of Mercy in New York, and all of his personalty which exceeds, when added to the personalty of the said Society, $75,000, passes to his heirs and distributees, for the reasons in the opinion. *Same*, 365.

87. The act of March 9, 1868, repealing the act of March 4, 1865, incorporating the Kentucky Insurance Co., is constitutional; and the proviso of sec. 1, act of Feb., 1856 (2 Stanton, 121), was intended to secure the rights of beneficiaries and others vested under the charter, before its amendment or repeal, and does not affect the power to repeal its franchise. *Griffin* v. *Kentucky Ins. Co.*, 3 Bush, 592.

88. There is nothing in the charter or by-laws of the "Louisville Pilot Benevolent and Relief Association," approved Feb. 22, 1860, either unconstitutional or inconsistent with public policy or the laws of Kentucky. *Lee* v. *L. P. B. & R. Association*, 2 Bush, 254.

89. A director of a corporation organized under the act for the formation of corporations (2 Rev. Stat., 517), who has given notice pursuant to sec. 16 thereof, will be liable for debts subsequently created by the corporation, beyond the capital stock of the company, with his assent express or implied. *Cornwall & Maize* v. *Eastham, &c.*, 2 Bush 561.

COSTS.

1. Sections 3 and 5, of chapter 26, of General Statutes, operate as a repeal of the provisions of the Code of Practice which give to the court a discretion upon the subject of costs of suit. Where a bond for costs, in a suit by a non-resident or a corporation, was not executed *before* the commencement of the action, it is imperative on the court to dismiss the action. (Gen. Stat., 265.) *Portsmouth F. and M. Works* v. *Iron Hills F. and M. Co.*, 11 Bush (March 18, 1875).

2. The statute of March 1, 1860 (Myers' Sup., 107), as amended (Acts 1867–8, p. 25), was not intended to compel one joint owner of an estate to pay counsel for services rendered against his wishes, at the instance of another joint owner; but was intended to apply to cases where all had a common interest, and where a part—without objections or assistance from the others—prosecuted suits for their joint benefit. *Thirlwell's adm'r* v. *Campbell, guardian, &c.*, 11 Bush (April 19, 1875).

3. Costs in court of appeals taxed against the appellant, although the judgment of the police court, deciding an ordinance of Bowling Green invalid, is reversed. *City of Bowling Green* v. *Carson*, 10 Bush, 64.

4. For clerk's fees against one party the circuit court erroneously adjudged a lien upon a fund to which the other party was entitled. *Wilson, &c.* v. *House, &c.*, 10 Bush, 406.

5. Costs incurred in an unsuccessful attempt to probate a will must be paid out of the estate of the deceased, and should be taxed by the county court. *Gilbert* v. *Bartlett*, 9 Bush, 49.

6. One half of the costs in this case was properly charged against the executor individually, as a considerable portion of the litigation grew out of his attempt to escape the advancement charged against him by the testator. *Grigsby's ex'r* v. *Wilkinson, &c.*, 9 Bush, 91.

7. The trustee is not entitled to retain his costs and attorney's fees out of the trust-fund, in an action against him to recover the profits and interest realized by him on it, which he ought to have paid without suit. *Young and wife* v. *Smith, &c.*, 9 Bush, 421.

8. See ACTION (9 Bush, 708); and NEW TRIAL (9 Bush, 738).

9. Costs of an action to quiet the title to land: if defendant does not disclaim, he should be adjudged to pay costs. *Moore, &c.* v. *Boner, &c.*, 7 Bush, 26.

10. The party to whom a new trial is granted upon the payment of costs shall, previous to such new trial, pay the costs of the former trial. *Carbon & Bettis* v. *Stout*, 7 Bush, 609. Gen. Stat., chap. 26, sec. 27, requires the costs of former trial to be paid within forty days after the new trial is granted upon that condition.

11. Costs unnecessarily incurred shall be paid by the party who incurs them. *Helm, &c.* v. *Short*, 7 Bush, 623.

12. Bond to perform judgment of the court (prescribed by sec. 215, Civil Code), embraces costs of the action. *Galloway* v. *Bethune, &c.*, 6 Bush, 113.

13. The trust fund in this case should have been charged with the costs of the litigation. *Fleming* v. *Wilson, &c.*, 6 Bush, 610.

14. Recognizances of record for costs sufficient, and may be enforced by summary proceedings or by ordinary action. *Kincy* v. *O'Bannon's ex'x*, 6 Bush, 692.

15. Two appeals taken upon the same record, costs of unnecessary transcript should not be taxed for party filing it. *Dean* v. *Ball*, 3 Bush, 502.

16. Unless the judgment on the appeal from a quarterly or justice's court is more favorable to appellant than the original judgment, he shall pay the costs of the appeal. Where he merely succeeds in reducing the amount of the judgment rendered against him, it shall be at the discretion of the court to allow him costs or not. (Civil Code, sec. 850.) *Gentry* v. *Doolin*, 1 Bush, 1. But see now, sec. 15, chap. 26, Gen. Stat., 266.

COUNTIES.

See CORPORATIONS.

COUNTER-CLAIM AND SET-OFF.

1. See ACTION; PENITENTIARY (9 Bush, 708); and SINKING FUND.

2. If the matter alleged as constituting a counter-claim involves only a denial of what is averred in the petition, or an affirmance of what is therein denied, it ought not to be regarded as new matter, and may be treated as if presented in a reply. *Davis* v. *Dycus*, 7 Bush, 4.

3. Equity will set off the debt of one partner of a non-resident firm against a debt due the firm by a resident of Kentucky. *Wallenstein* v. *Seligman & Co.*, 7 Bush, 175.

4. Indebtedness of the indorser of a bill to the drawer may be pleaded as a set-off by the acceptor, in an action against him by the indorser. *Bowman* v. *Wright*, 7 Bush, 375.

5. The Bath County Court purchased Moore's bond, with a fund levied for paying interest on bonds executed to the Lexington and Big Sandy R. R. Co. In an action on the bond, certificates of payments of railroad taxes—restitution of which was claimed on the allegation that the taxes had been illegally levied—could not be used as a set-off against the bond. *Moore* v. *Bath Co. Court*, 7 Bush, 177.

COUNTY COURTS.

1. See COMMON SCHOOLS (9 Bush, 640); CORPORATIONS; EXECUTORS AND ADMINISTRATORS; TAXATION; and WILLS.

2. An act requiring the county court to subscribe for stock in a railway company in behalf of a precinct through which the road passes, is held to be constitutional. *Allison, &c.* v. *Louisville, Harrod's Creek & Westport R. R. Co.*, 10 Bush, 1.

3. The power to license the retailing of liquors, under act of January 23, 1867, must be exercised with discretion, and the privilege granted only when expedient, proper, or beneficial. *Pierce* v. *Commonwealth*, 10 Bush, 6.

4. The county court was bound to levy a tax, etc., for the support of negro paupers for 1868–'69–'70. See opinion, for construction of acts in reference to negro paupers. *Featherston* v. *Thompson, &c.*, 10 Bush, 140.

5. Under the act of Feb. 26, 1873, the "county judge," and not the county court, has power to appoint a collector of back-taxes for Jefferson county. *Hoke* v. *Field*, 10 Bush, 144.

6. The right of the appointee to be inducted into office, depends upon his showing that the officer having the power to appoint has exercised that power, and decided in his favor. (Marbury v. Madison, 1 Cranch, 157.) *Hoke* v. *Field*, 10 Bush, 144.

7. The appointment may be oral, if made in the presence of the tribunal charged with the duty of taking the bond, and administering the oath of office to the appointee. (Saunders v. Owen, 12 Mod. Rep., 200; 2 Salkeld, 467.) *Hoke* v. *Field*, 10 Bush, 144.

8. One county court cannot compel the court of an adjoining county to provide means to construct a bridge between the counties. If the counties differ, and one county court refuses to act, the circuit court of that county is made the arbiter between them. (Revised Statutes, chap. 84, secs. 30–35.) *Garrard Co. Court* v. *Boyle Co. Court*, 10 Bush, 208.

9. In matters of probating wills and granting letters of administration, county courts have general and exclusive, not special or limited, jurisdiction. *Jacob's adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

10. Where a court has no jurisdiction over certain subjects except in certain cases, the facts conferring jurisdiction must appear in the record of proceedings. But if the jurisdiction over the subject-matter is complete, the action of the court will be taken to be within its jurisdiction, unless the contrary appear. *Jacob's adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

11. The jurisdiction of county courts in matters of probate and administration may be questioned collaterally; but in such cases the *onus* is on the party raising the issue. *Jacob's adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

12. The act of Feb. 18, 1854, for the appointment of special judges, is not within the inhibition of the constitution, that an act shall relate to but one subject, which shall be expressed in the title. *Jacob's adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

13. Guardians and administrators are not officers of the county court; but trustees, having such an interest in the execution of their trusts as entitles them to protection from removal by the court without just cause. (Isaacs v. Taylor, 3 Dana, 600; Murray v. Oliver, 3 B. Mon., 1.) *Dunlap* v. *Kennedy*, 10 Bush, 539.

14. An order of the county court, directing the judge to subscribe for stock in the railroad company upon contingency therein named, did not of itself amount to a subscription. *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

15. The county judge's voting, in meetings of the stockholders, did not bind the county to the subscription, as by ratification or estoppel. *Cumberland & Ohio R. R. Co.* v. *Barren Co. Court*, 10 Bush, 604.

16. The court of appeals has jurisdiction of an appeal from an order of the Jefferson county court directing the collection of a tax, under the act of Feb. 11, 1873, to incorporate a police municipality in Jefferson county. *Bate, &c.* v. *Speed, &c.*, 10 Bush, 644.

17. By the words "county court" is generally understood a court presided over by the county judge alone. But in laying the county levy, making appropriations, etc., the justices of the peace are associated with the judge. *Bowling Green & Madisonville R. R. Co.* v. *Warren Co. Court*, 10 Bush, 711.

18. The charter of the railroad company provides, that when it shall "request, etc., the county court so requested may, *in their discretion*, order an election," etc. *Held*—that this provision gave the county judge no authority to submit the question to a vote of the people, without having associated with him a majority of the justices of the county. *Bowling Green & Madisonville R. R. Co.* v. *Warren Co. Court*, 10 Bush, 711.

19. County courts of this State are courts of limited jurisdiction, and derive all their powers from some express statutory enactment. *Gilbert* v. *Bartlett*, 9 Bush, 49.

20. Any person may obtain an order of the county court to enter and survey any number (between 25 and 200) of acres of vacant lands, as prescribed in sec. 3, chap. 102, Rev. Stat. *Register* v. *Reid*, 9 Bush, 103.

21. The county judge is held liable for taking a guardian's bond so imperfect as not to bind the sureties. *Kinnison* v. *Carpenter, &c.*, 9 Bush, 599.

22. The clerk must submit orders and other writings of the county court to the judge for approval; the judge is responsible for errors in such writings. *Ibid.*

23. The judge and justices of a county court are not liable, in a civil action, for injuries to a traveler by the falling of a bridge, constituting part of the public highway under control of said court. *Wheatley* v. *Mercer, &c.*, 9 Bush, 704.

24. A county court has no authority, at a subsequent term, to vacate or set aside an order establishing a will, nor to grant a new trial. *McCarty, &c.* v. *McCarty, &c.*, 8 Bush, 504.

25. The bond purchased by the county court of Bath, with taxes levied for paying interest on the bonds executed to the Lexington & Big Sandy R. R. Co., is a trust fund for the holders of bonds issued to said R. R. Co. *Moore* v. *Bath Co. Court*, 7 Bush, 177.

26. Subscription of stock in a turnpike road by the Nelson county court, *held* to be valid. *Foreman, &c.* v. *Murphy, &c.*, 7 Bush, 303.

27. Where the will requires no security of the executor, the county court or any person interested may require it. *Atwell* v. *Helm*, 7 Bush, 504. (Gen. Stat., chap. 39, sec. 4, page 441.)

28. Order of court requiring executor to give surety is not final until enforced, and then the appeal should be taken to the circuit court. *Same*, 504.

29. Poor-houses are not the only means of providing for the poor; and the Fayette county court has authority to appropriate money towards the cost of additional buildings erected by the Orphan Society of the city of Lexington. *Orphan Society, &c.*, v. *Fayette Co. Court*, 6 Bush, 413.

30. County court, in the clerk's office of which the deed or will creating the trust is recorded, has jurisdiction of making settlements. (Civil Code, secs. 28, 521.) *McAfee, trustee, &c.* v. *Baldwin*, 6 Bush, 537.

31. The county court should, under the act of Feb. 28, 1862 (Myers' Sup., 4), fix the value of property which had not been assessed, and certify the same to the proper officer for collection, as required by said act. *McAlister's ex'r* v. *Commonwealth*, 6 Bush, 581.

32. Subscriptions to turnpike roads in Nicholas county, by county judge, under the act of Feb. 9, 1864 and amendments thereto, are void because the act had not been complied with by

private persons subscribing as the act required. *Clay and others* v. *Nicholas Co. Court*, 4 Bush, 154.

33. If order of the county court binding a child as an apprentice do not exhibit the facts required by law for giving jurisdiction to the court, it is void. *Chaudet* v. *Stone*, 4 Bush, 210; *Small* v. *Small*, 2 Bush, 45.

34. In apprenticing negro or mulatto orphan child, county court, under act of Feb. 18, 1866 (Myers' Sup., 720), should give preference to former owner, if a suitable person. *Lamb, &c.* v. *Lamb*, 4 Bush, 213.

35. When the county court approves the proposed names and individuals as sureties in a bond, and directs the clerk to prepare the bond, he has no authority to witness and accept it until all of the named sureties sign it. *Fletcher, &c.* v. *Leight, &c.*, 4 Bush, 303.

36. County courts have power to remove sheriffs from office, for failing to give new bonds at the time prescribed by the court. *Bartley* v. *Fraine, &c.*, 4 Bush, 375.

37. County court has no authority to take the original bond from the sheriff for the collection of the revenue, except at the January or February term. *Calloway* v. *Commonwealth*, 4 Bush, 383. (Gen. Stat., art. 8, chap. 92, sec. 3, page 731.)

38. County court has power to require sheriff to execute supplemental bonds at any other term, either for the indemnity of his sureties or that of the Commonwealth. *Same*, 383.

39. The discretion of county courts to grant or refuse license to sell spirituous liquors, etc., is broad, but should not be exercised in an arbitrary and unlimited manner. *Hoglan* v. *Commonwealth*, 3 Bush, 147.

40. In this case, the delinquent should have been summoned to show cause why he had not listed with the clerk of the county court, after the return of the assessor's books, and before the 1st of Sept., and the summons was "to show cause why he had not listed with the assessor," &c. *Vance* v. *Commonwealth*, 3 Bush, 465.

41. At a subsequent term, the county court has power to set aside an illegal order and indenture of apprenticeship, made at a former term, and release the orphan from the custody of the

person to whom he was illegally bound, on his petition by next friend. *Small* v. *Small*, 2 Bush, 45.

42. Where no ground of necessity existed for binding out the negro boy, the county court had no authority to do so, under the act of 16 Feb., 1866. *Thomas, &c.* v. *Newcom*, 1 Bush, 83.

COUNTY JUDGE.

1. The words of sec. 3, art. 1, chap. 48, General Statutes, p. 503, imply that the county judge, while sitting as a court, should either have personal knowledge that the surety offered by the guardian is sufficient, or should institute an inquiry as to the solvency of the proposed surety. He is liable to the ward for any damages he may sustain by reason of surety being insufficient, when appointed. (Rev. Stat., 575.) *Colter* v. *McIntire*, 11 Bush (Dec. 1, 1875).

2. Where a guardian's bond was defectively executed, the judge was responsible to the person injured. *Kinnison* v. *Carpenter, &c.*, 9 Bush, 599.

3. Orders and writings of the county court are presumed to have been done under the sanction and direction of the judge. *Ibid.*

4. Against county judge for failure to take proper guardian's bond, the ward alone has a right of action under the statute. Any one aggrieved by his misfeasance has a common-law right of action. *Ibid.*

5. Cause of action, in favor of surety seeking release from guardian's bond, accrued against the judge at the time of misfeasance. *Ibid.*

6. The presiding judge of a county court appointing a guardian, will be answerable to the ward, if no bond is taken for estate coming to hands of the guardian, and which he fails to pay over. Order of county court reciting that a bond had been taken is not conclusive that it was done. *Daniels* v. *Vertrees*, 6 Bush, 4.

7. The office of county judge incompatible with that of postmaster. *Hoglan* v. *Carpenter*, 4 Bush, 89.

8. Whatever may be the powers of a county judge to impose fines upon a jailer, for violation of rules prescribed by the county

court for willful neglect of official duty, an indictment is the proper remedy provided by the Constitution (sec. 36, art. 4); and no legislative enactment is necessary to give the grand jury jurisdiction. *McBride* v. *Commonwealth*, 4 Bush, 331. The case of *Commonwealth* v. *Mitchell*, 3 Bush, 39, overruled, so far as inconsistent with the foregoing case.

9. The county judge and justices have legal authority to employ medical aid for the relief of poor persons afflicted with small-pox, without regard to color. *Rodman, &c.* v. *Justices of Larue Co.*, 3 Bush, 144.

10. The county judge should, from time to time, prescribe rules for the government and cleanliness of the jail, and comfort and treatment of prisoners, and enforce the rules. *Commonwealth* v. *Mitchell*, 3 Bush, 39. (Art. 1, chap. 61, sec. 10, Gen. Stat., 567.)

11. A county judge who issued his warrant, tried and rendered his judgment against the defendant for a breach of the peace, having no jurisdiction, was a trespasser, and liable in damages. *Scott* v. *West*, 1 Bush, 23.

12. A suspension of license of a tavern-keeper by the county judge or court, is a nullity, unless the offender had been summoned to appear to show cause, etc. *Plummer* v. *Commonwealth*, 1 Bush, 26.

13. County judge has no jurisdiction to impose fine of $100 on non-resident defendant, upon charge of peddling without license. *Curtis* v. *Commonwealth*, 1 Bush, 125.

14. County judge of Meade county has no authority to bind the county to pay for general treatment of small-pox in Brandenburg. *Pusey* v. *Meade Co. Court*, 1 Bush, 217.

COURT OF APPEALS.

See APPEALS.

COVENANTS.

1. See CONTRACTS; and DEEDS.

2. The covenants in railroad mortgage bonds which allow trustees, upon the happening of certain contingencies, to take

possession of and operate the roads for the benefit of the bondholders, may be specifically enforced in a court of equity. (Shipley v. Atlantic and St. Lawrence R. R. Co., 55 Maine, 406; Shaw, &c., trustees v. Norfolk Co. R. R. Co., 5 Gray, 162.) *Douglas, &c.* v. *Cline, &c.*, 11 Bush (Nov. 2, 1875).

CRIMINAL LAW AND PROCEEDINGS.

I. Felonies.
II. Misdemeanors.
III. Trial in Criminal and Penal Prosecutions.
1. Indictment.
2. Evidence.
3. Instructions.
4. Verdict, Arrest of Judgment, and Appeals.

I. FELONIES.

1. An essential prerequisite to the establishment of the guilt of one accused of perjury is, that the oath shall have been administered "by a person authorized by law to administer an oath." *Biggerstaff* v. *Commonwealth*, 11 Bush (April 19, 1875).

2. See ACCESSORIES; and INDICTMENT.

3. A single justice of the peace has no power to admit to bail one charged with a felony. A bond taken by one only is unauthorized and void, and should be quashed. *J. T. Murphy, &c.* v. *Commonwealth*, 11 Bush (June 9, 1875).

4. Bishop (1 Bishop's Crim. Law, 5th ed., sec. 850) holds the law to be, that where an attack is made with murderous intent, the person attacked is not required to flee, but may stand his ground, and, if it be necessary, kill his assailant. The rule thus stated is also supported by the cases of Phillips, 2 Duvall, 328; Young, 6 Bush, 312; and Bohannon, 7 Bush, 481, and is the settled law of this State. *Holloway* v. *Commonwealth*, 11 Bush (Sept. 28, 1875).

5. To excuse a man for homicide, it is sufficient that he had no other apparently safe means of escape. *Holloway* v. *Commonwealth*, 11 Bush, Sept. 28, 1875).

6. If Holloway was without fault, and he believed, and had reasonable grounds to believe, that Shaw was about to take his life or do him great bodily harm, and he had no other appar-

ently safe means of securing himself from the then impending danger, he had the right to shoot, and he is excusable upon the ground of self-defense and apparent necessity. (Shorter v. The People, 2 Comstock, 197; Logue v. Commonwealth, 2 Wright, 265; Rapp v. Commonwealth, 14 B. Monroe, 614; Meredith v. Commonwealth, 18 B. Monroe, 49.) The rule as established by these cases is, that if the defendant acts upon "reasonable grounds," he is to be excused, although it may turn out "that the appearances were false, and there was, in fact, neither design to do him serious injury nor danger that it would be done." *Holloway* v. *Commonwealth*, 11 Bush (Sept. 28, 1875).

7. "Neither a sudden quarrel, nor sudden heat or passion, will necessarily reduce an unlawful homicide to manslaughter. A mere quarrel will never do so; for the law will not accept mere words—however opprobrious and insulting—as an excuse for blows or to mitigate a homicide." *Nichols* v. *Commonwealth*, 11 Bush (Dec. 9, 1875).

8. "Malice is a malignant passion, and may exhibit itself in wrongful acts; and when an act is cruel, and is done deliberately—as such acts are generally the offspring of an evil mind—the law will imply the existence of the secret passion from the proof of the outward sign of its presence." *Nichols* v. *Commonwealth*, 11 Bush (Dec. 9, 1875).

9. "An unlawful homicide committed deliberately—*i. e.*, intentionally and maliciously—is murder." *Nichols* v. *Commonwealth*, 11 Bush (Dec. 9, 1875).

10. To excuse homicide on the ground of self-defense, the danger to the slayer must be imminent. *Berry* v. *Commonwealth*, 10 Bush, 15.

11. Where a person is mortally wounded, and a carefully performed and necessary surgical operation is the immediate cause of death, the person who inflicted the wound will still be responsible for the death. (3 Cushing, 181; 21 Alabama, 300.) But if the surgical treatment is grossly erroneous, the original author will not be responsible. *Coffman* v. *Commonwealth*, 10 Bush, 495.

12. Homicide is excusable on the ground of self-defense, if the slayer believes, and has reasonable grounds to believe, that there is immediate impending danger, and that he has no other

apparent and safe means of escape—although the supposed danger has no existence. *Coffman* v. *Commonwealth*, 10 Bush, 495.

13. The several persons present at a homicide may be guilty in different degrees, as one of murder, another of manslaughter. *Mickey* v. *Commonwealth*, 9 Bush, 593.

14. One cannot be convicted of murder as an aider and abetter of others who committed the deed, unless he had confederated with them to attack, or commit a felony, or else, knowing their malice, he aided or encouraged them. *Mickey* v. *Commonwealth*, 9 Bush, 593.

15. A party whose negligence causes the death of another is responsible, whether the business in which he was engaged was legal or illegal. If the business is felonious, the offense is murder; if legal, the offense is manslaughter. There may be exceptions to the rule. *Chrystal* v. *Commonwealth*, 9 Bush, 669.

16. Reasonable doubt of defendant's guilt under sec. 236, applies to prosecutions under indictment against all classes of public offenders. *Souder, &c.* v. *Commonwealth*, 8 Bush, 432.

17. Mental insanity is a good defense to an indictment for murder; and in some cases moral insanity has been held to excuse. But voluntary drunkenness neither excuses the offense nor mitigates the punishment. Evidence of drunkenness is evidence on the question of malice; for malice, express or implied, must be proved in order to constitute murder. The proper rule is, that one in a state of voluntary intoxication is subject to the same rule of conduct, and to the same principles and rules of law, that a sober man is. *Shannon* v. *Commonwealth*, 8 Bush, 463. Smith v. Commonwealth, 1 Duvall, 224, and Blimm v. Commonwealth, 7 Bush, 320, are overruled, so far as they conflict with Shannon v. Commonwealth, above.

18. To constitute murder, the killing must be unlawful, as well as predetermined. *Bohannon* v. *Commonwealth*, 8 Bush, 481. The law of self-defense does not require a man to leave home or secrete himself, to avoid his enemy. Fear grounded on threats, or upon information that one lies in wait, will not justify killing, unless the threats, etc., have been accompanied by an attempt to kill, or to commit some other felony; and not then, unless the person so circumstanced believes, and has rea-

sonable grounds to believe, that the presence of his enemy puts his life in imminent peril, and that he can escape such peril in no other way. *Same*, 481.

19. One whose life has been threatened, and who has been attacked with a deadly weapon, may arm himself to resist his foe; may leave his home for any legitimate purpose, and if he casually meets his foe, having good reason to believe him to be armed and ready to execute his threats, and that his personal safety can be secured in no other way, he need not wait to be assaulted, but may secure himself from impending danger, even by killing his adversary if it be necessary to do so. *Same*, 481. The case of *Carico* v. *Commonwealth*, 7 Bush, 124, not binding authority upon the law of self-defense; and the case of *Phillips* v. *Commonwealth*, 2 Duvall, 331, re-affirmed, so far as it conforms to the law of self-defense as expressed in this case. *Same*, 481.

20. "Deadly weapon," as used in the statute, embraces any deadly weapon with which a person may be wounded by cutting or stabbing, to-wit, a chisel. *Commonwealth* v. *Branham*, 8 Bush, 387.

21. Color of military authority is no excuse for those who participate in shooting citizens. *Edgerton* v. *Commonwealth*, 7 Bush, 142.

22. Rape on a white woman, committed by a colored man, in 1869—how punished, and instructions to jury. *Blair* v. *Commonwealth*, 7 Bush, 227.

23. In indictment for larceny, ownership of the property must be averred, unless some excuse appears for the omission. And when the evidence is not embodied in the record, court of appeals will presume that the verdict is right, and the action of the court also. Erroneous instructions must be objected to when given. *Reed* v. *Commonwealth*, 7 Bush, 641.

24. The court should not leave it to the jury to determine for themselves what constitutes legal provocation; and, however great the provocation must be, to lower the grade of the crime of murder, it is not restricted to a state of case constituting an excuse for killing in self-defense. To constitute murder, it must appear that malice existed at the time of the killing, without regard to the time which it had before existed; and to instruct to the effect that in any case the use of a deadly weapon,

not in necessary self-defense, whereby death ensues, will constitute murder, is erroneous. It does not follow that every homicide, committed by the use of a deadly weapon, and not in necessary self-defense, is murder. *Donnellan* v. *Commonwealth*, 7 Bush, 677. But the use of a deadly weapon is evidence of malice. *Same*, 677.

25. If accused had sufficient reason to apprehend, and did apprehend, that the deceased would take his life, or that he was in continual danger of losing his life or suffering great bodily harm from him, and that if he returned to his house the attack would be renewed upon him, he had a right to pursue his enemy until he might reasonably believe he was secure from danger; and if, after having stopped, the deceased returned and again assaulted him with deadly weapons, and he had cause to believe, and did actually believe, from his persistent attacks and previous threats, that he would take his life or do him great bodily harm, and he slew him, after having been assaulted, it was excusable homicide, in self-defense. *Young* v. *Commonwealth*, 6 Bush, 312.

26. Accused asked small boy if his grandfather had some gold, and being answered that he had, asked boy if he could get it, which was answered in the affirmative. It was then agreed that the boy should get the money and hide it at the stable; and that accused should come at night and tap on the door, and the boy run out and shoot at him. The boy got the money and hid it, and the man came and was shot at, but could not find the money. Boy afterwards took the money and delivered it to the accused. The accused was not a principal. *Able* v. *Commonwealth*, 5 Bush, 698. Distinctions between principal in first and second degree, and accessory before and after the fact, laid down in this case.

II. MISDEMEANORS.

1. The court of appeals cannot take jurisdiction of a misdemeanor case, unless the record be lodged in the clerk's office within sixty days after judgment. (Commonwealth v. Adams, 16 Ben Monroe, 338.) *Wood* v. *Commonwealth*, 11 Bush (June 10, 1875).

2. A party convicted of dealing faro is deemed infamous (Revised Stat., chap. 47, art. 1, sec. 6)—i. e., disqualified for suffrage, and for holding any office of honor, trust, or profit;

but that does not take away from the Commonwealth or any litigant the right to make use of him as a witness. *Holloway* v. *Commonwealth*, 11 Bush (Sept. 28, 1875).

3. A proper construction of sec. 12, art. 13, chap. 33, of the General Statutes, denouncing a penalty for stuffing a ballot-box, etc., should include any one delivering a fraudulent ballot to the judge or any one else who inserts it in the box for him, whether with or without a corrupt motive on the part of the one inserting the ballot. *Commonwealth* v. *Gale*, 10 Bush, 488.

4. The only punishment which can be inflicted for a riot, rout, or breach of the peace, in any court of this State, is a fine not exceeding $100, or imprisonment not exceeding fifty days, or both, at the discretion of the jury. *White* v. *Commonwealth*, 10 Bush, 557.

5. An accomplice in malicious shooting is not liable to the same punishment as the person committing the act; but only to a fine or imprisonment, or both, as provided in sec. 2, art. 6, chap. 29, Gen. Stat. (Stamper v. Commonwealth, 7 Bush, 612.) *Bland* v. *Commonwealth*, 10 Bush, 622.

6. Sec. 20, art. 8, of the State Constitution, which deprives persons guilty of dueling of the right to hold office, was intended as a punishment. *Commonwealth* v. *Jones*, 10 Bush, 725.

7. The deprivation of the right to vote is a punishment. *Burkett* v. *McCarty*, 10 Bush, 758.

8. Permitting games in a coffee-house for treats, is a violation of the statute. *Stahel* v. *Commonwealth*, 7 Bush, 387.

9. It is unlawful to carry deadly weapons concealed, for a lawful purpose. *Cutsinger* v. *Commonwealth*, 7 Bush, 392.

10. Accomplices in the crime of willful and malicious shooting at and wounding another, are not punishable. *Stamper* v. *Commonwealth*, 7 Bush, 612. Not so now. They are punishable, since Dec. 1, 1873. See sec. 2, art. 6, chap. 29, Gen. Stat., 325.

III. TRIAL IN CRIMINAL AND PENAL PROSECUTIONS.

1. Indictment.

1. No citizen can be put upon trial for an infamous crime, except upon the indictment of a grand jury. (Constitution of Kentucky.) *Kimbrough* v. *Lane, &c.*, 11 Bush (Nov. 27, 1875).

2. Grand jurymen must be citizens and housekeepers of the county, and over the age of twenty-one years. (Rev. Stat., chap. 55, art. 1, sec. 1.) Lack of proper qualification by a member of the grand jury renders indictments found by such jury subject to be set aside. (Crim. Code, sec. 159.) *Commonwealth* v. *Smith, &c.*, 10 Bush, 476.

3. A motion to set aside an indictment must be made when the case is called for trial, or the right to make it is waived; and thereafter the defendant should be refused leave to plead any other than a meritorious plea in bar. (Crim. Code, sec. 158.) *Ibid.*

4. Objection to the indictments because one of the grand jurors was not a housekeeper, made at the second term after the defendants were before the court on process, came too late. *Ibid.*

5. The indictment must contain a statement of the acts constituting the offense, in ordinary and concise language, and must be direct and certain as regards the party and the offense charged, where they are necessary to constitute a complete offense. *White* v. *Commonwealth*, 9 Bush, 178.

6. No indictment is insufficient by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits. *Ibid.*

7. Defendant may be tried again upon a sufficient indictment, the judgment of conviction on insufficient indictment having been arrested or reversed. *Ibid.*

2. Evidence.

1. Circumstantial evidence—being conceded to be competent, and sufficient when of a satisfactory character to warrant a conviction—should be left, like direct or positive evidence, to be considered by the jury, without caution or suggestion by the court as to its value, or the necessity to scrutinize it closely. *Brady* v. *Commonwealth*, 11 Bush (Sept. 13, 1875).

2. The admission, by the adverse party, that the facts to which an absent witness will swear (as set forth in an affidavit) are absolutely true, renders the presence of the witness wholly unnecessary; his testimony delivered *ore tenus* could not possibly do more than establish the absolute truth of his statements. *Nichols* v. *Commonwealth*, 11 Bush (Dec. 9, 1875).

3. If evidence that the prisoner once entertained the purpose to kill deceased, had a tendency to contradict the facts admitted by the Commonwealth to be true, the court should have rejected the evidence, or have told the jury not to consider such evidence, except in deciding whether the prisoner did the killing. *Nichols* v. *Commonwealth*, 11 Bush (Dec. 9, 1875).

4. Where a witness for the prosecution remembered a part only of the declaration of the accused relative to the homicide, the accused had the right to introduce other witnesses, who heard the entire conversation, to prove the whole—unless he himself drew forth the statement from the witness as to the declaration. *Coffman* v. *Commonwealth*, 10 Bush, 495.

5. "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed." (Criminal Code, sec. 238.) *Cunningham* v. *Commonwealth*, 9 Bush, 149.

6. The jury must determine from the evidence whether any confessions of guilt were in fact made by the accused. *Ibid.*

7. An *opinion* of a witness is not competent evidence. *Johnson* v. *Commonwealth*, 9 Bush, 224.

8. Affidavit of defendant for a continuance being admitted to be true, he has a right to have it read as evidence to the jury. *Young* v. *Commonwealth*, 8 Bush, 366.

9. Confessions induced by promises, threats, or advice of prosecutor, or officer having the prisoner in charge, or of any person having authority over him, or the prosecution itself, or of a private person in the presence of one in authority, will not be deemed voluntary, and will be rejected. But confessions superinduced by indifferent persons, acting officiously, without any kind of authority, will be admitted. *Same*, 366.

10. Advice to surrender and confess his guilt, given to defendant by a friend when the house was surrounded by the sheriff and his *posse*, should not be regarded as given in the presence of the sheriff. Such advice did not render subsequent admissions incompetent, although it may have induced him to make them. *Same*, 366.

11. The court should decide as to the admissibility of admissions. *Same*, 366.

12. Evidence conducing to prove defendant's guilt as principal in the second degree competent, under indictment in general terms charging defendant as one of the slayers. *Same*, 366 (1 Met., 13).

13. One jointly indicted with others cannot be a witness for or against the others, so long as the indictment against him remains undisposed of. *Edgerton* v. *Commonwealth*, 7 Bush, 142.

3. Instructions.

1. The duty of a court is to instruct the jury "on the law applicable to the case"—which, by a clear implication, prohibits the court from making suggestions to the jury as to the weight of any particular species of evidence, or what consideration they should give it. *Brady* v. *Commonwealth*, 11 Bush (Sept. 13, 1875).

2. "The jury cannot convict on a mere preponderance of testimony, but the law presumes the prisoner innocent until he is proven guilty beyond a reasonable doubt. Proven guilty beyond a reasonable doubt means, that the jury must be convinced from the testimony, of the truth of every fact necessary to establish his guilt." We see no good reason upon which to base the refusal of the court below to give this instruction. *Holloway* v. *Commonwealth*, 11 Bush (Sept. 28, 1875).

3. The prisoner had the right to have the jury told that if they were of opinion that, from all the circumstances of the case, he believed, and had reasonable grounds to believe, that Shaw had sought him out for the purpose of killing or doing him great bodily harm, and was prepared therefor with a deadly weapon, and made demonstrations manifesting an intention to commence an attack, then he (the prisoner) was not obliged to retreat, but had the right to stand and defend himself; and if, in so doing, it was necessary, or upon reasonable ground appeared to be necessary, that he should kill his antagonist, the killing is excusable upon the ground of self-defense. *Holloway* v. *Commonwealth*, 11 Bush (Sept. 28, 1875).

4. The fact of drunkenness, while it may be a circumstance showing the absence of malice, should not be singled out from the other proof, and the jury told that it mitigates the offense. *Nichols* v. *Commonwealth*, 11 Bush (Dec. 9, 1875).

5. Instructions should be identified in the record. *Weatherford* v. *Commonwealth*, 10 Bush, 196.

6. Where the accused and deceased quarreled, and the latter invited the former to go into an adjacent street with him and settle the matter, and they went, and a fight ensued in which the latter was killed, the court erred in instructing the jury to assume that the going into the street voluntarily was with a hostile intent. *Coffman* v. *Commonwealth*, 10 Bush, 495.

7. Instructions should contain only such facts as must be found by the jury in order to establish the guilt or innocence of the accused. *Coffman* v. *Commonwealth*, 10 Bush, 495.

8. An instruction is erroneous that requires that the slayer should have been without fault, before heat of passion could reduce from murder to manslaughter a killing done by a blow of the fist in a sudden quarrel. *Coffman* v. *Commonwealth*, 10 Bush, 495.

9. Courts should not instruct juries as to what a reasonable doubt is, but merely follow the language of the Code. *Mickey* v. *Commonwealth*, 9 Bush, 593.

10. It is presumed that the statements in the bill of exceptions are true, and that the instructions stated were all that were given. *Mickey* v. *Commonwealth*, 9 Bush, 593.

11. A jury should not be compelled to consider the indictment in order to ascertain the meaning of the instructions of the court. *Ibid.*

12. The court improperly instructed the jury that in identity of time to prove an *alibi*, it must be made to appear by some certain standard of time or time-piece. *Young* v. *Commonwealth*, 8 Bush, 366.

13. Defendant was not indicted for shooting and killing Coulter; and the instruction directing the attention of the jury to the intention with which the shooting was done, and assuming that he shot and killed Coulter when there was no evidence that he was present or had any hand in killing him, or that Coulter was then killed, is erroneous. *Edgerton* v. *Commonwealth*, 7 Bush, 142.

14. Instructions should not be too numerous and prolix; and those given at the instance of the Commonwealth, excluding

grounds of self-defense, are erroneous. *Moore* v. *Commonwealth*, 7 Bush, 191.

4. Verdict, Arrest of Judgment, and Appeal.

1. The court of appeals has no power to reverse for an error of the circuit court in overruling a demurrer to an indictment. *Biggerstaff* v. *Commonwealth*, 11 Bush (April 19, 1875).

2. The appellate jurisdiction of the court of appeals in felony cases is limited by section 334 of the Criminal Code. It cannot reverse a judgment in such cases for a defect in the indictment that does not authorize an arrest of judgment. A judgment can be arrested, only when the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. (Crim. Code, sec. 271.) *Weatherford* v. *Commonwealth*, 10 Bush, 196.

3. Though several persons be jointly indicted for distinct offenses charged to have been jointly committed, if the indictment charged the one on trial in person with the commission of the offense, the judgment should not be arrested. *Weatherford* v. *Commonwealth*, 10 Bush, 196.

4. Verdict and judgment may be rendered against one of two persons jointly indicted. (Bishop on Criminal Procedure, sec. 223). *Weatherford* v. *Commonwealth*, 10 Bush, 196.

5. An order of commitment of a prisoner to jail should state the cause of commitment and the length of time he is to be held. *Ayars, &c.* v. *Cox*, 10 Bush, 201.

6. An escaped prisoner convicted of a felony will not be permitted to prosecute an appeal to reverse the judgment of conviction. *Wilson* v. *Commonwealth*, 10 Bush, 526.

7. Judgment in a criminal case should be reversed for an error, though it was not specified in the grounds for a new trial. *Johnson* v. *Commonwealth*, 9 Bush, 224.

8. A judgment for conviction cannot be reversed because the verdict is not sustained by the evidence. *Johnson* v. *Commonwealth*, 9 Bush 224.

9. The discharge of a juror, against the objection of the prisoner, after the jury was sworn, operated as a discharge of the entire jury, and an acquittal. *O'Brian* v. *Commonwealth*, 9 Bush, 333.

10. A challenge for implied bias may be taken where the juror was a member of the grand jury that found the indictment; but where this fact is disclosed, and the accused fails to object or ask a discharge of the jury, he waives his right, and cannot afterwards for this cause avoid the verdict or obtain a new trial. *Ibid.*

11. Section 248 of the Criminal Code does not restrict the power of the court to discharge a jury to the causes enumerated therein. The section was intended only as an adoption of the legal rule that a case of actual necessity must exist before a jury can be discharged. *Ibid.*

12. The court was not authorized, without the consent of the accused, to discharge the juror—except in case of his sickness, or some accident preventing his continuance on duty; and his discharge terminated the legal existence of the jury. *Ibid.*

13. Where one is being tried for murder, every interference on the part of the State after the jury has charge of the prisoner, preventing a verdict of guilt or innocence—unless upon necessity or showing his consent—must operate as an acquittal, and bar any other prosecution for the same offense. *Ibid.*

14. What answer was expected from the witness must appear, in order to show that the court erred in not permitting it. *Chrystal* v. *Commonwealth*, 9 Bush, 669.

15. Error in allowing or disallowing challenge for cause, is not ground for reversal. *Moore* v. *Commonwealth*, 7 Bush, 191.

CROP TO BE RAISED.

A mortgage of a crop to be raised on a farm passes no title, if the crop was not sown when the mortgage was executed; and the mortgagee has no claim against a purchaser of the crop for it or its value. *Hutchinson, McChesney & Co.* v. *Ford*, 9 Bush, 318.

CROSS-PLEADINGS.

1. A cross-petition must set up a cause of action affecting the subject-matter of the action. (Civil Code, sec. 125.) *Royse* v. *Reynolds*, 10 Bush, 286.

2. One defendant to a suit cannot recover judgment against a co-defendant, without a cross-pleading and service of process thereon or appearance by defendant thereto. *Cavin & Elliott* v. *Williams & Ray*, 8 Bush, 343. The case of Jenkins v. Smith, 4 Met., 380, disapproved.

3. There are exceptions to the general rule, in chancery practice, that one defendant shall not have judgment against a co-defendant, except on cross-pleading asking relief, &c. *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

CURTESY.

1. See HUSBAND AND WIFE.

2. Possession by some coparceners, amicably to the others, is a sufficient seizin in fact to invest and sustain an estate by the curtesy in the husbands of such others. *Carr, &c.* v. *Givens*, 9 Bush, 679.

DAMAGES.

1. See INJUNCTIONS (9 Bush, 745); NEGLIGENCE; and PLEADINGS AND PRACTICE IN CIVIL ACTIONS (9 Bush, 728).

2. A municipal officer, whose duty it is to collect delinquent taxes, cannot recover damages where, in consequence of an extension by the city council of the time within which taxes may be paid without penalty, the commissions allowed him as compensation or salary are reduced. *Wheatly* v. *City of Covington*, 11 Bush (March 9, 1875).

3. Damages are sometimes allowed in lieu of interest, in an action upon an unliquidated account, in cases where the debtor is justly chargeable with delinquency; but never when the delay is the result of the mere failure of the creditor to press the collection of his claim. *Adams Express Co.* v. *Milton*, 11 Bush (March 19, 1875).

4. Where a consideration has been paid, and necessary expenditures incurred by the grantee, in revoking the grant, the latter —like a purchase of land by parol—must be indemnified. *Dillon* v. *Crook & Co., &c.*, 11 Bush (Sept. 24, 1875).

5. A contractor is liable for the wrongful act of his subordinate, in digging a cellar so deep and so unskillfully as to undermine and throw down the wall of an adjoining house. *Robinson, &c.* v. *Webb*, 11 Bush (Oct. 23, 1875).

6. In suits to make one answerable for another's neglect, the relation of master and servant is the only basis of responsibility. To incur the responsibility, the master must not only have the power to select the servant or agent, but to direct the mode of executing the work, and to so control him in his acts in the course of the employment as to prevent injury to others. If this relation does not exist, no liability on the part of one for the negligence of another can arise. *Robinson, &c.* v. *Webb*, 11 Bush (Oct. 23, 1875).

7. Where the relation of independent contractor exists, as to the use of real property, and the party employed is skilled, and the thing directed to be done is not a nuisance or will not result in a nuisance, the injury resulting from the negligent manner of doing the work by the contractor or his servants—the owner cannot be made to respond in damages. If the act or work to be done must necessarily result in a nuisance, unless the same be prevented by proper precautionary measures, it devolves upon the owner to take those measures. (City of Chicago v. Robbins, 2 Black, 427; Mattheny v. Wolf, 2 Duvall, 137; Cuff v. N. and N. Y. R. R. Co., 35 New Jersey, 19; Stone v. City of Utica, 17 N. Y.; &c., &c.) *Robinson, &c.* v. *Webb*, 11 Bush (Oct. 23, 1875).

8. Compensatory damages only can be given for a personal injury resulting from a railroad accident. $30,000 damages—for loss of time, the loss of one leg and the injury to the other, and for mental and physical suffering—are excessive, and the result of passion or prejudice in the jury. (Many cases of heavy damages for personal injuries quoted and discussed.) *Louisville and Nashville R. R. Co.* v. *Fox*, 11 Bush (Nov. 2, 1875).

9. Where an instruction was asked that if the accident was wholly caused by a fresh break in the rail, and the break was wholly caused by frost, the jury should find for the defendant; it was altogether proper for the jury to be told that if extreme cold was not the sole cause of the break, but contributed thereto jointly with the negligence or carelessness of the railroad com-

pany's agents or servants, the law was for the plaintiff in a suit for damages. *Louisville and Nashville R. R. Co.* v. *Fox*, 11 Bush (Nov. 2, 1875).

10. In an action for damages for a breach of contract, where the agreements are mutual and dependent, and each is to perform his part at the same time, the petition must aver that the plaintiff was ready to perform his part, or it will be fatally defective. And neither the answer nor verdict will cure the defect where the sole issue was whether there was any contract. *Sousely* v. *Burns' adm'r*, 10 Bush, 87.

11. The rule forbidding the estimation of damages upon the basis of a calculation of profits is not of universal application. Damages which are the natural and proximate consequence of the act complained of, may undoubtedly be recovered. (2 Greenleaf on Evidence, 210.) *Elizabethtown & Paducah R. R. Co.* v. *Pottinger & Bro.*, 10 Bush, 185.

12. So with damages that can be readily determined, and are such as may reasonably be inferred to have been contemplated by the parties. (Barker & Co. v. Mann, Bennett & Co., 5 Bush, 679; Hadley v. Baxendale, 9 Exchequer, 341.) *Ibid.*

13. Profits which are the direct and immediate fruits of the contract violated are part and parcel of it, and must have been contemplated by the parties. *Ibid.*

14. A contractor, who has been wrongfully prevented from completing his work, may recover such profits as he would otherwise, probably, have realized. (7 Cushing, 516; 13 Howard, 307; 6 McLean, 612; Thompson v. Jackson, Owsley & Co., 14 B. Mon., 92.) *Ibid.*

15. A contractor, compelled to abandon his contract by the conduct of his employer, may claim and prove his prospective profits as part of the damages. *Ibid.*

16. A contractor did not forfeit his right to the fifteen per cent. retained by his employer, when he was driven from his work by the arbitrary conduct of the company's agent. *Ibid.*

17. A judicial officer acting beyond his authority, or within his jurisdiction, but actuated by malicious motives, is liable as a trespasser to any injured party. *Ayars, &c.* v. *Cox*, 10 Bush, 201.

18. Punitive damages cannot be recovered against a corporation, unless the motive of its servants be bad, the negligence *quasi*-criminal. (Board of Internal Improvements of Shelby County v. Searce, 2 Duvall, 576; Louisville & Portland Canal Co. v. Murphy, adm'r, &c., 9 Bush, 522; Louisville, Cincinnati & Lexington R. R. Co. v. Case's adm'r, 9 Bush, 728.) *Jacob's adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

19. In a contract, a forfeiture agreed upon as liquidated damages should be enforced, unless it be so exorbitant that to enforce its payment would be to inflict a penalty on the party in default, instead of merely making good the injury sustained by reason of the breach. *Elizabethtown and Paducah R. R. Co.* v. *Geoghegan*, 9 Bush, 56.

20. Forfeitures are regarded by courts with little favor, and will seldom be upheld, if intended to operate as penalties. But there are cases in which parties will be allowed to agree upon a definite sum as the amount of damages which may result from the violation of their contract. *Ibid.*

21. A contractor having a valid and binding contract, may recover damages against a city when his contract has been violated, or when he has suffered loss by the neglect of the corporation to discharge some duty with reference to the contract of which the contractor is not required to take notice. *Murphy* v. *City of Louisville*, 9 Bush, 189.

22. The tendency and preference of law is to regard a sum stated to be payable, if a contract is not fulfilled, as a penalty, and not as liquidated damages; because then it may be apportioned to the loss actually sustained. *Bell* v. *Pruitt*, 9 Bush, 257.

23. On a covenant, in an oil lease, to commence operations in one year, or thereafter to pay twenty-five dollars per annum until the work is commenced, the lessor should in no event recover more than nominal damages for the breach of the covenant. *Ibid.*

24. Owners of property adjacent to an improvement cannot have consequential damages by reason of such improvement, when constructed with care and skill, and not interfering with any private right to light, air or passway; otherwise, actual and direct damages are sustained. *Newport & Covington Bridge Co.* v. *Foote, &c.*, 9 Bush, 264.

25. Damages not accrued at the time of trial cannot be recovered by the plaintiff, when, as in this case, the contract declared on will admit of an indefinite number of actions, in case the alleged breach shall be continued. *Keith's ex'r, &c.* v. *Hinkston*, 9 Bush, 283.

26. Employer assenting to trespass of his contractor is liable for value of materials taken. *Dawson & Young* v. *Powell*, 9 Bush, 663.

27. A grand juror is not liable, in a civil action for damages, for anything he may have said or any vote he may have given, relative to any matter legally before the grand jury. *Ullman, &c.* v. *Abrams*, 9 Bush, 738.

28. Owners of a steamboat are liable for an assault upon a passenger, by the third clerk of the boat; and the jury may give exemplary damages. *Shirley* v. *Billings*, 8 Bush, 147.

29. A coke-boat moored in the Ohio river was run against by a wood-boat, and sunk. Unless the owners of the wood-boat, by their carelessness and want of skill, brought about the collision, they were not liable; and not then, if the coke-boat was so carelessly moored in the river as to obstruct navigation by the wood-boat under ordinary skill. *Digby, &c.* v. *Kenton Iron Co.*, 8 Bush, 166.

30. The plaintiff's right to recover is not limited to the rents which the defendant may receive, but to what the use of the property was reasonably worth. *Louisville & Nashville R. R. Co.* v. *Simon B. Buckner*, 8 Bush, 277.

31. By the act of 28th August, 1862, a sheriff or other like officer is exonerated from the thirty per cent. damages, for not returning an execution in the time prescribed, on so much of the debt as he shall have paid; and if partly paid by him, he is responsible for damages only on the part remaining unpaid. The fine imposed by said act cannot be assessed by the jury. *Bank of Louisville* v. *Hurt, &c.*, 8 Bush, 633. (Myers' Sup., 213; secs. 5, 6, art. 17, chap. 38, Gen. Stat., 439.)

32. The owner of land adjacent to the land of another, has no right to remove the earth and thus withdraw the natural support of his neighbor's soil; and if he does so, he is liable for damages, and may be restrained by injunction. This doctrine is strictly confined to cases in which the owner of land has

not, by building or otherwise, increased the lateral pressure on the adjoining soil. (2 Hilliard on Torts, 152, 153; Farrand v. Marshall, 19 Barbour, 380.) *Oneil* v. *Harkins*, 8 Bush, 650.

33. Judgments for land, and for damages for detention, are distinct; one is enforced by *ha. fa.* and the other by *fi. fa. Shean* v. *Cunningham*, 6 Bush, 123.

34. Damages embraced by attachment bond. See *Carpenter* v. *Stevenson*, 6 Bush, 259. Also, the title, ATTACHMENT.

35. Failure of the defendant to answer does not authorize court, without proof and without a jury, to assess damages. *Wood* v. *Morgan*, 6 Bush, 507.

36. The refusal of an offer to perform services will entitle the party offering to perform to recover such damages as he actually sustained; but the offer to perform is not equivalent to performance. *Same*, 507.

37. Plaintiff may recover punitive damages for personal injuries, where the act complained of is accompanied with circumstances of aggravation. *Slater* v. *Sherman*, 5 Bush, 206. Matters that occurred months before the trespass, are not admissible in mitigation of damages. *Same*, 206.

38. For seduction of a man's daughter, the injury to the father's feelings and the dishonor of his family are proper matters for the jury to consider, in making up their verdict for damages. *Wilhoit* v. *Hancock*, 5 Bush, 567.

39. Court of appeals cannot award damages, on affirmance of judgment, unless an order of supersedeas has been issued. *Reed* v. *Lander*, 5 Bush, 598.

40. For suit against the Commonwealth for damages, see CONSTITUTIONAL LAW. Also, *Commonwealth* v. *Jackson*, 5 Bush, 680.

41. The penalty of double damages against any person not having a lawful fence, who shall in any mode hurt, lame, kill, &c., any cattle which may have broken over or through said fence, applies to one who used and controlled the premises, whether he was the owner or not. *Jones* v. *Hood*, 4 Bush, 80.

42. In an action on an attachment bond to recover expenses, only such as were incurred in defending the attachment can be recovered. *Johnson* v. *Farmers' Bank of Ky.*, 4 Bush, 283. For malicious suit, probable cause not being made out, plaintiff

is entitled to recover damages commensurate with the injury. *Same*, 283.

43. Damages on dissolution of injunction rendered against executrix personally, where injunction was for her benefit, and not for the benefit of the estate. *Offutt's ex'x* v. *Bradford, &c.*, 4 Bush, 413.

44. See COMMON SCHOOLS; and *Hill and Bergen* v. *Harris*, 4 Bush, 450.

45. The defendant having confirmed the judgment and sale, by a compromise with the purchaser of the land, is without further remedy, and not entitled to recover against the commissioner or plaintiff, when by his own acts he contributed largely to a sacrifice of his land. *Brown* v. *Hudson*, 3 Bush, 60.

46. On dismissal of appeal, suspending execution of the judgment for a fine, damages will be awarded against appellant in favor of the Commonwealth. *Evans* v. *Commonwealth*, 3 Bush, 161.

47. Rendering judgment for fourteen dollars, ten per cent. damages on dissolution of injunction, when the damages at ten per cent. amount to less than seven dollars, erroneous. *Moss* v. *Rowland, &c.*, 3 Bush, 505.

48. Interest should be allowed on cash advances, not as matter of discretion but as matter of legal damages. *Field* v. *Burnam, &c.*, 3 Bush, 518.

49. In pursuance of a notice in writing, more than six months previous thereto, defendant, in January, 1866, severed and removed part of his portion of division fence, and the remainder in March following. *Held*—only liable to nominal damages. *Gwinn* v. *Ditto*, 3 Bush, 547.

50. In an action against the owners of a steamboat for damages, secs. 451, 454, Civil Code, require that the damages be assessed by a jury, where defendant failed to appear. The captain being served with process in one county, and the owners in another, after the death of the captain and abatement of suit as to him, the court of the county in which he was served had jurisdiction under amendment of 1860 to sec. 85, Civil Code. *Shirley, &c.* v. *Landram*, 3 Bush, 552.

51. In action of trespass, the non-responsibility of defendant being shown by uncontradicted evidence, the court should in-

struct the jury to find as in case of a non-suit. *Parker* v. *Jenkins*, 3 Bush, 587.

52. In case of trespass or torts, accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, the jury have discretion to award vindictive damages. In all other cases of civil injury or breach of contract, the object is to give compensation to the party injured for the actual loss sustained. Compensation consists in remuneration for loss of time, necessary expenditures, and for permanent disability. The amount of compensatory damages is a question of law, not governed by any arbitrary assessment, nor left to the fluctuating discretion of either judge or jury. *Same*, 587.

53. In an action for damages for fraud in selling an interest in a shoe store; the jury had a right to infer fraud and deception, by delusive misrepresentations or suppression, or both, in the exercise of their peculiar function. *Ward* v. *Crutcher and wife*, 2 Bush, 87.

54. Judgment for a specific thing, in detinue or replevin, entitles the successful party to its value, if it be not restored. The value must be assessed by the jury at the time of finding a verdict for the thing. *Bates* v. *Buchanan*, 2 Bush, 117.

55. Judgment taking petition for confessed is final, and leaves nothing for litigation, except the value of the property sued for. *Kendrick* v. *Fields*, 2 Bush, 153.

56. It appearing that the inattention of the agents of Adams Express Company was the probable cause of the failure to carry the cotton, and the certain cause of the failure to show what became of it, said company was held liable. *Adams Express Co.* v. *McDonald*, 1 Bush, 32.

57. For instigating and procuring the unlawful arrest and imprisonment of plaintiff, the defendant is liable for each day the imprisonment was continued. *Huggins* v. *Toler*, 1 Bush, 192.

58. The value of the use of the land taken by a railroad must be paid, without regard to consequential advantages resulting to the owner from the construction of the road. The charter of this road entitles the owner to consequential damages, resulting from the construction and use of the railroad through his land, subject to a set-off of consequential advantages. The cost of fencing is a consequential damage, against which consequen-

tial advantages may be set off. *Louisville & Nashville R. R. Co.* v. *Glazebrook*, 1 Bush, 325.

59. For failure to pay a debt in gold, no recovery in damages can be had for its value over legal tender notes. *Riley's ex'r* v. *Sharp, &c.*, 1 Bush, 348.

60. If a slave escape through the negligence of railroad employees, but afterwards returns to his master, the latter can only recover for the services of the slave while absent. *Louisville & Nashville R. R. Co.* v. *Young*, 1 Bush, 401.

61. As a general rule, the criterion of damages for the taking and conversion of personal property is the value of the property at the time of the taking. *Greer* v. *Powell, &c.*, 1 Bush, 489.

62. See ACTION. *Burr, McGrew & Co.* v. *Woodrow*, 1 Bush, 602, and *Shinkle* v. *City of Covington*, 1 Bush, 617.

63. The measure of damages for failure to receive and pay for property, is the difference between the contract price and the actual value of the property when it should have been received under the contract. *Williams & Davis* v. *Jones and wife*, 1 Bush, 621.

DAYS.

When the computation is to be made from an act done, the day on which the act was done must be included; because, since there is no fraction in a day, the act relates to the first moment of the day on which it was done. (Chiles v. Smith's heirs, 13 B. Mon., 460.) But when the computation is to be from the day itself, and not from the act done, then the day on which the act was done must be excluded. (Bellaris v. Hester, 1 Lord Raymond, and authorities cited.) *Wood* v. *Commonwealth*, 11 Bush (June 10, 1875).

DECEDENTS' ESTATES.

1. Upon exceptions to the master's report in settlement of decedent's estate, the merits of the claim and sufficiency of the proof can always be inquired into and passed upon. *Horner* v. *Harris' ex'r*, 10 Bush, 357.

2. But a creditor has a right to file his petition, and, if the facts therein set forth are controverted, to demand that the grounds of defense be stated and verified according to the rules of pleading. *Horner* v. *Harris' ex'r*, 10 Bush, 357.

3. Affidavit and demand by the agent of the creditor is sufficient evidence of the agency. *Howard's adm'r* v. *Leavell's adm'x*, 10 Bush, 481.

4. The object of the statute in requiring a demand, is to afford the personal representatives an opportunity to pay the debt without the cost of a suit. But the demand may be waived by the personal representative, before or after suit. *Howard's adm'r* v. *Leavell's adm'x*, 10 Bush, 481.

5. Where a claim is in the form of a foreign judgment, the proper affidavit, accompanied by a mere statement of the judgment, is not a compliance with the statute. *Howard's adm'r* v. *Leavell's adm'x*, 10 Bush, 481.

DECREE.

See JUDGMENT.

DEDICATION.

1. The act of dedicating land to public use for a street or highway, does not of itself convert the land into a public street or highway. There must be some acceptance of the dedication by the county court or town, upon their records, or by continued use for such a length of time as would imply an acceptance, before an indictment can be maintained for nuisance against those who obstruct travel. *Gedge, &c.* v. *Commonwealth*, 9 Bush, 61.

2. The legal effect of a dedication is determined by its terms, and not by the intentions of the dedicator in making it. *Elizabethtown, Lexington & Big Sandy R. R. Co.* v. *Combs*, 10 Bush, 382.

3. Dedication of land for public purposes may be made by parol, and proved by parol evidence. In this case, the court sustained the gift, being of land to erect a house of religious

worship upon. *Griffey, &c.* v. *Bryars, &c.*, 7 Bush, 471. (9 B. Mon., 200; 11 B. Mon., 155; 5 Bush, 401.)

4. Selling lots bounded by streets is a parol dedication of their use for all the purposes pertaining to such an easement; but the owner's right to the soil is not divested thereby. *West Covington* v. *Freking*, 8 Bush, 121.

5. The center line of a private street opened by the grantor, upon which he sells lots bounded by it, is the limit and boundary of the lots. *Trustees of Hawesville* v. *Lander, &c.*, 8 Bush, 679.

6. Deed made in consideration of $800 to trustees, requiring them, after the consideration was reimbursed, &c., to apply the profits to the New School Presbyterian Church of Versailles; and if it should be dissolved, to be disposed of for the benefit of N. S. Presbyterian Church of Kentucky. Had the grantor been a donor of a charity, a failure in the object of the dedication would have resulted in a reversion; but in this case it was a sale, for an admitted valuable consideration. *Morrow, &c.* v. *Slaughter*, 5 Bush, 330.

7. The fee in such a case (dedication for a public use) may remain in abeyance, for want of a grantee capable of taking it; and the party making it cannot reassert any right, so long as it remains subject to the use to which it was made. *McKinney, &c.* v. *Griggs, &c.*, 5 Bush, 401.

8. To entitle trustees to a conveyance of land dedicated by writing for a church, and upon which a church had been erected, they should allege that the congregation had used the church and in good faith intended to continue the use of it, for the purpose intended by the donor. *McDaniel* v. *Watson, &c.*, 4 Bush, 234.

DEEDS.

1. See ESTOPPELS.

2. The certificate of acknowledgment of a deed by a married woman is *prima facie* evidence only of her separate examination, etc., and extraneous evidence may be heard to show the real state of facts. (Ford v. Teal, 7 Bush, 156; Woodhead v. Foulds, 7 Bush, 222.) *Hughes & Co., &c.* v. *Coleman, &c.*, 10 Bush, 246.

3. Mere preponderance of such extraneous evidence against the certificate, is not sufficient to overcome the legal presumption of its corresponding with the facts. *Hughes & Co., &c.* v. *Coleman, &c.*, 10 Bush, 246.

4. A conveyance must be accepted by the grantee to become effectual. The rights of a creditor of the grantor, intervening before acceptance, will be protected against the claims of the grantee or privies. (2 Washburn on Real Property.) *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

5. Acceptance of a deed will not be presumed merely because beneficial; it is essential to prove notice to the grantee of its execution, and such additional circumstances as will afford a reasonable presumption of his acceptance of it. (28 Texas, 773.) *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

6. Grant of right of way to one railroad, to be void if the county should vote a tax for the road. The tax was voted. *Held*—that the condition subsequent was broken, though the road meanwhile had changed hands. *Kenner, &c.* v. *American Contract Company*, 9 Bush, 202.

7. At common law, a fee-simple estate could be destroyed by breach of condition subsequent, only upon an entry by the grantor or his heirs. (2 Blackstone, 155.) *Ibid.*

8. But an estate for years, not being created by livery of seizin, upon breach of condition subsequent, was terminated without re-entry. *Ibid.*

9. Modern authorities establish the doctrine that the happening of the condition subsequent does not *ipso facto* determine the estate, but it is subject to be defeated at the election of the grantor and his heirs; and the waiver of a forfeiture may be inferred from the failure of the party entitled to the estate to re-enter in a reasonable time after the termination of the estate, and particularly where the grantee is permitted to make valuable improvements on the premises after the condition is broken. *Ibid.*

10. Where before the condition was broken the grantor died, devising his entire estate, the right of forfeiture or contingent interest went with the land to the devisees, and they occupied the same position toward the property and grantee that the grantor did. *Ibid.*

11. A separate estate was not created by the following, in a conveyance by the husband and wife to a trustee for the use of the wife, to-wit, that the trustee "shall and will hold the aforesaid property and effects, and the proceeds thereof, for the use of" the wife, "free from any future charge or debt on the part of her husband." *Harris, adm'r*, v. *Harbeson*, 9 Bush, 397.

12. A special power to dispose of property by will was not conferred by the following, in a conveyance by the husband and wife to a trustee for the use of the wife, to-wit, "to use, sell or exchange, or to re-invest or otherwise dispose of the whole or any part of said property and effects, and the proceeds thereof, in any manner she may think proper." *Ibid.*

13. "Special power" to dispose of by will, within the meaning of the statute, is a power which is specifically, or as clearly and unequivocally manifested, of disposing by will of some particular estate. *Harris, adm'r*, v. *Harbeson*, 9 Bush, 397.

14. Although a married woman signs a deed, and is privily examined thereon by the proper officer, it will not pass her potential right to dower, unless the deed purports to pass it, or she is named as one of the grantors in the deed. *Prather, &c.* v. *McDowell and wife*, 8 Bush, 46; *Hatcher and wife* v. *Andrews*, 5 Bush, 561.

15. Bond for land provided that it should not be subject to any debt created by the vendee before a particular date. This provision is inconsistent with the grant, and therefore void. *Carlin's adm'r* v. *Carlin, &c.*, 8 Bush, 141.

16. Deed made by commissioner, after the death of the plaintiff, on notice without revivor, does not pass legal title. *Gill* v. *Hewett*, 7 Bush, 10.

17. Extraneous evidence is admissible, to prove that the acknowledgment of a married woman to a deed was in the husband's presence without a privy examination. Also, that it was neither read nor explained to her before her acknowledgment, and that her husband was present. *Ford, &c.* v. *Teal*, 7 Bush, 156; *Woodhead, &c.* v. *Foulds, &c.*, 7 Bush, 222.

18. A deed made by an infant *feme covert* cannot be avoided by her on that ground, when, to induce an innocent purchaser to make the purchase, she and her husband made oath to the

best of their knowledge, &c., that she was over twenty-one. *Schmitheimer and wife* v. *Eiseman*, 7 Bush, 298.

19. Deed acknowledged and lodged for record passes the legal title, as between vendor and vendee; and any subsequent vendee may pay the tax and fees, and have the deed recorded. *Knight* v. *Whitman*, 6 Bush, 51.

20. Recitals in a deed that given amounts were paid are not conclusive evidence who paid them, which may be shown by parol or other evidence. *Bryant* v. *Hunter*, 6 Bush, 75.

21. Deed not lodged for record within eight months is good against a subsequent purchaser with notice. Notice to the husband is notice to the wife. *Bennett and wife* v. *Titherington, &c.*, 6 Bush, 192.

22. Title may be passed and vested by act of the Legislature. *Trustees of Hawesville* v. *Hawes' heirs*, 6 Bush, 232.

23. A separate estate and right to trade in her own name may be conferred on a married woman by deed. *Hackett & Callaghan* v. *Metcalfe, &c.*, 6 Bush, 352.

24. A deed to a mother conveying land to her and her present heirs forever, conveys to her a life estate; and her children living at the date of the deed took an estate in remainder after the mother's death. *Foster* v. *Shreve, &c.*, 6 Bush, 519.

25. A deed executed in 1836, conveying to husband and wife land which had descended to her from her father, and for which he held a title bond, did not deprive the wife of any part of the land; and at her death it descended to her heirs, subject to the curtesy of the husband. The recitals in the deed were sufficient notice to subsequent purchasers from her husband and their vendees. *Simmons, &c.* v. *McKay, &c.*, 5 Bush, 25.

26. Deed made to one, and consideration paid by another, no resulting trust, unless taken without consent of the other. (Sec. 20, chap. 80, Rev. Stat., 230; Gen. Stat., 587, 588.) But this does not apply to conveyances made before the Revised Statutes took effect. Party receiving a conveyance must hold according to agreement, or refund the money paid by the party who paid for the land. *Martin* v. *Martin, &c.*, 5 Bush, 47.

27. Vendees having accepted deed with covenant of general warranty, vendors being non-resident, before purchase money is

coerced are entitled to an unencumbered title. *Hatcher and wife* v. *Andrews*, 5 Bush, 561.

28. A covenant "that no ardent spirits were ever to be vended in the house or on the premises in large or small quantities," is legal. Damages because of this encumbrance and contingent right of dower, may be ascertained and deducted from unpaid purchase money. *Hatcher and wife* v. *Andrews*, 5 Bush, 561.

29. Title to real estate vested in a married woman and her child or children, makes child born, *eo instanti*, joint tenant with its mother. *Powell* v. *Powell, &c.*, 5 Bush, 619.

30. Objections to authentications of deeds may be answered by presumptions resulting from lapse of time. *Rutherford's heirs* v. *Clark's heirs*, 4 Bush, 27.

31. Recitals in deeds are not evidence when assailed by creditors. *Jarboe, &c.* v. *Colvin, &c.*, 4 Bush, 70.

32. Land purchased by parents and conveyed to their children, the latter stand in no more favorable attitude than the parents would have stood if it had been conveyed to them. *Worley* v. *Tuggle, &c.*, 4 Bush, 168.

33. When, by mistake or fraud, a deed or other writing does not conform to the real contract, the chancellor can reform it, upon satisfactory parol proof, and compel specific performance according to the real contract. But in reforming it, the rights of third parties must be regarded. *Same*, 168.

34. A father-in-law's deed, which by mistake conveyed land to his son-in-law instead of to his daughter, can be reformed after death of both grantor and grantee. *Mattingly, &c.* v. *Speak*, 4 Bush, 316. The mistake must be established, and must not rest upon an inference from the weight of evidence. *Same.*

35. "Children," when inserted in a writing conveying or for a conveyance of land, is a word of purchase. Children in being are parties, and those after-born take their respective shares. *Cessna, &c.* v. *Cessna's adm'r, &c.*, 4 Bush, 516.

36 The recital in the deed that the consideration is paid, is good as to the parties, but is no evidence between grantees and other parties strangers. *Goins* v. *Allen, Morton & Co.*, 4 Bush, 608.

37. An agent's conveyance by a less extensive warranty than the power might authorize, is not voidable. *McMillan's heirs* v. *Hutcheson, &c.*, 4 Bush, 611.

38. Copy of deed conveying land in Kentucky, made in Philadelphia, and acknowledged and certified by the mayor in 1807, and recorded in the clerk's office of the court of appeals in 1809, properly admitted as evidence. *Patterson* v. *Hansel*, 4 Bush, 654.

39. When a sale and conveyance has been made by an agent, under a proper power of attorney, the acknowledgment of which is defective, chancellor should compel a proper conveyance. *Colsten's heirs* v. *Chaudet, &c.*, 4 Bush, 666.

40. A deed *not* signed by either guardian or ward (who was insane), but whose names were mentioned in the deed as parties conveying, was notice to subsequent purchasers that the ward held an unconveyed interest in the land. *Anderson, &c.*, v. *Layton, &c.*, 3 Bush, 87.

41. Deed and note executed simultaneously, the deed only stipulating about the interest and the consequences of failure to pay, will be construed together as one instrument. *Parks' ex'r* v. *Cooke*, 3 Bush, 168.

42. The tender of a deed which fails to comply with the contract of sale, or fails to give a description of the land, is not good. *Williams* v. *Abrahams*, 3 Bush, 186.

43. Under a Virginia patent, issued before the separation of Kentucky, the rights of patentee are to be determined by the laws of Virginia. *Berry* v. *Snider, &c.*, 3 Bush, 266.

44. A deed being attacked as fraudulent, no other evidence than the recitals in the deed being offered to show that a valuable consideration was in good faith paid, held to be fraudulent. *Whitaker* v. *Garnett, &c.*, 3 Bush, 402.

45. Prior to the adoption of the Revised Statutes, in case of a conveyance of land to a man and wife jointly, the survivor took the whole estate. Since their adoption, and Gen. Stat. 531, sec. 13, survivorship is destroyed, unless the conveyance expressly provides for it. *Croan, &c.* v. *Joyce, &c.*, 3 Bush, 454.

46. A grantee holding possession under a deed which was acknowledged before and recorded by an officer not authorized by law to do so, is still notice to the world of ownership of the land. *Simpson's ex'r* v. *Loving, Jackson & Co.*, 3 Bush, 458.

47. Husband, as next friend of his wife, filed a petition against her to sell her land, held by her under a deed conveying it to her for her sole and separate use, alleging that said words were inserted by mistake in the deed, and obtained a judgment to correct a mistake, &c. The sale being confirmed, they cannot have the judgment reversed which was obtained by their own procurement. *Stone and wife* v. *Werts, &c.*, 3 Bush, 486.

48. The principle to be deduced from the various adjudications on the subject of acknowledgments of conveyances is, that if—after allowing proper credit to the officer for official knowledge and fidelity, and giving proper effect to the legal presumption that he did his duty—the certificate, either expressly or by clear implication, imports that the examination and acknowledgment were in effect conformable with the statute, it will be conclusive, whatever may be the language used in drafting it. (Nantz v. Bailey, 3 Dana, 111; Gregory v. Ford, 5 B. Mon., 471; Gill, &c. v. Fauntleroy's heirs, 8 B. Mon., 177.) *Martin* v. *Davidson's heirs, &c.*, 3 Bush, 572.

49. Notes were taken by the agent in his own name, and a deed for his constituents purporting to convey their title to the land executed simultaneously, which did not pass the title to vendee, yet it binds the constituents as much as their bond for a title in this case. *Casey, &c.* v. *Lucas*, 2 Bush, 55.

50. Husband and wife join in a conveyance of her estate to a third person, who reconveys to the husband. Deed held to vest title in the husband. *Willis and wife* v. *Woodward*, 2 Bush, 215.

51. Acknowledgment of the receipt of the consideration is only *prima facie* evidence of payment, and may be rebutted; and the recital of a particular consideration does not exclude proof of other and consistent consideration. (1 A. K. Marshall, 582; 1 Met., 285; 1 J. J. Marshall, 387.) *Engleman* v. *Craig*, 2 Bush, 424.

52. Where the wife joins the husband in a conveyance of her real estate, and converts it into personalty, equity will presume it to be a gift, unless repelled by evidence. But where she advances, or charges her separate estate for her husband's use, intending it as a loan, and not as a gift, she will be considered as the creditor. (Clancy on Husband and Wife, 590.) *Latimer, &c.* v. *Glenn, &c.*, 2 Bush, 535.

53. The acknowledgment and registration of a deed is only *prima facie* evidence that the grantee has accepted it. *Skillman* v. *Hamilton, &c.*, 1 Bush, 248.

54. One who accepts a deed from the Auditor for land previously granted by act of the Legislature, will be charged with constructive notice. *Corbin, &c.* v. *Mulligan*, 1 Bush, 297.

DEEDS OF TRUST.

See TRUSTS AND TRUSTEES.

DEFECTIVE PLEADING.

1. The contractor claiming for extra work, should allege an independent agreement, in order to avoid the stipulations of the covenant against any claim for extra work; but after verdict the omission is aided by the common law intendment, especially where the facts established sustain the cause of action. *Escott & Son* v. *White, &c.*, 10 Bush, 169.

2. Failure to establish an immaterial averment does not impair plaintiff's right to recover. *Louisville & Nashville R. R. Co.* v. *Goodnight, &c.*, 10 Bush, 552.

DEFENDANTS.

See ABSENT DEFENDANTS; and NON-RESIDENT DEFENDANTS.

DELIVERY.

Delivery of mortgage not dispensed with, by sec. 11, chap. 24, Rev. Stat. *Bell* v. *Farmers' Bank, &c.*, 11 Bush (Feb. 15, 1875).

DEMAND.

1. See BANK CHECKS; and CONSTABLES.

2. Affidavit and demand against a decedent's estate, by the agent of the creditor, is sufficient evidence of the agency. *Howard's adm'r* v. *Leavell's adm'x*, 10 Bush, 481.

3. The object of the statute in requiring a demand, is to afford the personal representative an opportunity to pay the debt without the cost of a suit. But the demand may be waived by the personal representative, before or after suit. *Howard's adm'r* v. *Leavell's adm'x*, 10 Bush, 481.

4. Where a claim is in the form of a foreign judgment, the proper affidavit, accompanied by a mere statement of the judgment, is not a compliance with the statute. *Howard's adm'r* v. *Leavell's adm'x*, 10 Bush, 481.

DEMURRER.

1. See PLEADING AND PRACTICE IN CIVIL CASES.

2. The filing of a demurrer and answer at the same time, does not preclude the defendant from waiving his right to a trial upon the merits, and standing by his demurrer. In this case, the defendant stood by his demurrer; and thereby waived the benefit of his defense of limitation pleaded in his answer. *Bridges* v. *Reed*, 9 Bush, 329.

3. An order sustaining a demurrer to jurisdiction and awarding judgment for costs, is a final order. *Dudley* v. *Kentucky High School*, 9 Bush, 576.

DEPOSITARY.

If a depositary of a bill indorse it in breach of the trust, the indorsee with notice can neither sue on it nor hold it against the owner. (Byles on Bills, 225; Miller v. Edwards, 7 Bush, 398.) *Prather, &c.* v. *Weissiger, &c.*, 10 Bush, 117.

DEPOSITIONS.

1. When two depositions are given by a witness, and one only was read in the court below, both depositions being copied in the record, the bill of exceptions should show which one was read. *Crabb* v. *Larkin, &c.*, 9 Bush, 154.

2. Deposition read by defendant, after his objection to plaintiff's reading it had been sustained: the plaintiff could not ob-

ject to this, as the defendant did what the plaintiff wanted done. *Ibid.*

3. Objection must be made to the reading of depositions. *Ibid.*

4. Depositions taken upon notice to corresponding attorney for non-resident infant defendants, before a guardian *ad litem* was appointed, may be read as evidence against such infants on the hearing, after the appointment and defense by the guardian. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

5. After his deposition was taken, the defendant was made a party by amended petition. Other depositions before taken could not, but his own could, be read against him, and it was unnecessary for him, as to the former, to except to their being read before the commencement of the trial. *Kerr* v. *Gibson*, 8 Bush, 129; and where they are taken between the same parties in a former suit in relation to the same matter, or persons claiming in privity with them, they may be read. *Same*, 129. (Brooks v. Cannon, 2 Marshall, 525.) *Roots* v. *Merriwether*, 8 Bush, 397.

6. A deposition taken to impeach the credit of a witness cannot be read by the adverse party, if the party taking it declines to read it, and also fails to assail the character of the witness intended to be impeached by the deposition. This is an exception to the general rule, that where a party takes a deposition and fails to read it, the adverse party may do so. *Sullivan, &c.* v. *Norris*, 8 Bush, 519.

7. A party should not be allowed to experiment on his rights, by introducing and examining or taking the deposition of a witness competent for him, and on finding it unfavorable to reject it as incompetent testimony against him. (3 Greenleaf on Evidence, sec. 326.) *Weil & Bro.* v. *Silverstone, &c.*, 6 Bush, 698.

8. A deposition being commenced in the presence of both parties, too late in the day to complete it, and the witness being unable to attend the next day, the party taking notified the other party that he would go on and take another deposition on the next day, so as to adjourn over to the third day to complete the first deposition. Thus completed on the third day, it may be read as evidence. *Jarboe, &c.* v. *Colvin, &c.*, 4 Bush, 70.

9. Exceptions to depositions are waived, when not acted on by the circuit court. *Patterson, &c.* v. *Hansel, &c.*, 4 Bush, 654; *Lewis* v. *Wright*, 3 Bush, 311.

10. The court should not permit exceptions for the same reasons to be again filed, when they have been once acted on. *Lewis* v. *Williams*, 4 Bush, 678.

11. After a divorce, the deposition of a husband is competent testimony against the wife's interest, if it divulges no communication between them during coverture. *Storms, &c.* v. *Storms, &c.*, 3 Bush, 77.

DESCENT AND DISTRIBUTION.

1. Distributees cannot sue and jointly recover judgment against the personal representative. *Pelly* v. *Bowyer, &c.*, 7 Bush, 513.

2. See opinion, for recital, discussion, and analysis of evidence, as to identity of John Lee. *Selman and wife, &c.* v. *William Lee's heirs*, 6 Bush, 215.

3. Land sold by an heir to a *bona fide* purchaser for value, is not liable to be sold for judgment obtained, after alienation, against the heir for a debt of the ancestor from whom the land descended; and a sale of the land thereunder does not constitute a breach of the vendor's warranty. *Anderson* v. *Summers*, 6 Bush, 423. (Sec. 8, chap. 44, Gen. Stat. 489.)

4. Testator devised to a trustee all of his estate for the use of his surviving wife for life, and died intestate as to the reversion. At his death, a present vested estate in the reversion passed by descent to his children, including a posthumous child; and at its death, its interest passed to its mother, brothers and sisters. The mother's interest thus acquired passed to her vendees. *Sansberry's ex'r* v. *McElroy & Rinehart*, 6 Bush, 440.

5. A pecuniary legacy charged on land which the wife is entitled to, passes by her death to her husband. *Gray* v. *McDowell*, 6 Bush, 475.

6. Salary of a deceased Congressman does not pass to his widow. *Sally Grider* v. *Rodes, &c.*, 5 Bush, 278.

7. B. Owens was sister to the intestate John Owens, and died before him, leaving an illegitimate daughter. This daughter

left a son T. J. Berry, who claimed a part of John Owens' estate as distributee. *Held*—that he was not entitled thereto except so far as the other distributees conceded his claim. *Berry* v. *Owens' heirs*, 5 Bush, 453.

8. Real estate which lapses vests, by descent, in testator's heirs; and when it does so, they have the right to take it as real estate, which cannot be defeated by the executors; and if the devisee had a specified time to elect to take the land or its proceeds, and failed to take proceeds, the executors have no right to sell within the prescribed time. *Buckner's ex'rs* v. *Cromie's ex'rs*, 3 Bush, 603.

9. In a judgment for assets descended, the amount that each heir received should be ascertained, and judgment rendered for an amount against each one not exceeding the amount so received, and not exceeding the amount claimed in the petition. The heirs are personally responsible for the costs, when judgment is rendered against them. *Ransdell, &c.* v. *Threlkeld's adm'r*, 4 Bush, 347.

10. Real estate conveyed to a woman and her heirs, &c., without excluding the marital rights of the husband, is not held by her as separate estate; and at her death, leaving a husband, such estate descends to her heirs-at-law, without any power in her to deprive them of it by last will. *Payne* v. *Pollard, &c.*, 3 Bush, 127.

11. A widow, where there are no infant children residing with her, and no adult or infant children not residing with her, is not required to distribute the property exempt from distribution and set apart to her under the several statutes. *Newman* v. *Winlock, adm'r, &c.*, 3 Bush, 241.

12. A natural son, being recognized by a father who procured the passage of an act of the legislature to make him capable of inheriting his estate, will inherit the father's estate if he survives him. *Drain, &c.* v. *Violett, &c.*, 2 Bush, 155.

13. Real estate derived by an infant, by devise from his maternal grandfather, if he dies an infant, without issue, will descend to the father of such infant. *Smith's ex'r* v. *Smith, &c.*, 2 Bush, 520.

14. Stewart gave to his wife, by will, the sole control of the income of his estate without accountability to any one. He left

four children, one a married woman, who died leaving a child. This child died in infancy, before its grandmother Stewart did. The father of this grandchild took no part of Stewart's estate. His wife's interest in remainder descended to her infant child, and at its death it passed to the brother and sisters of the mother by descent. *Stewart* v. *Barclay*, 2 Bush, 550.

15. The devise of an estate to an infant, subject to the condition that if she should not live to have heirs of her body, it should be placed, &c. She did not live to have heirs of her body. At her death, the profits of the estate did not pass under the will, but descended to her next of kin. *Lyne, &c.* v. *Cleveland's adm'r*, 1 Bush, 80.

DEVISES AND DEVISEES.

1. See HEIRS AND DEVISEES; and WILLS (9 Bush, 580).

2. Claimants of real estate may be barred from a recovery, by having received estate of value equal to the interest of such claimants from the grantor thereof, by descent, devise, or distribution. (Sec. 18, chap. 63, Gen. Stat., 587.) *Proctor, &c.* v. *Smith, &c.*, 8 Bush, 81.

3. Heirs and devisees are liable for all debts and liabilities of ancestor or testator, to extent of lands acquired by descent or devise. (Sec. 8, chap. 22, Gen. Stat., 250; secs. 5, 6, chap. 44, Gen. Stat., 489.) *Feltman* v. *Butts, &c.*, 8 Bush, 115.

4. Devisees in remainder are not divested of their estate by the proceedings, judgment, and sale thereof, in a suit to which they are not parties. *Same*, 115.

5. The heir or devisee, entitled to the estate after payment of debts, may require the personal representative to plead the statute of limitations, and upon his refusal to do so, the heir or devisee will be permitted to defend. (1 Met., 428.) *Payne and wife* v. *Pusey*, 8 Bush, 564.

6. The portion of the estate as to which the testator dies intestate must be distributed under the statute of descents. *Clarkson, &c.* v. *Clarkson, &c.*, 8 Bush, 655.

7. Where there is an implied trust imposed upon the devisee, it must be fulfilled; or, upon failure, the property may revert to

the pretermitted child. *Munday, by &c.* v. *Taylor, &c.*, 7 Bush, 491.

8. Legatees having resisted the establishment of the will by a protracted litigation, are entitled to interest on their legacies only from the establishment of the will. *Commonwealth, for use, &c.* v. *Lillard's ex'r*, 4 Bush, 398.

9. Heirs and devisees are liable in equity to a creditor, and the failure to make the demand required by sec. 473, Civil Code, before suit, does not apply to a suit against heirs or devisees. (Sec. 10, chap. 44, Gen. Stat., 490.) *Johnson, &c.* v. *Belt*, 4 Bush, 405.

10. Testator's debts and liabilities should be paid before legacies are paid. *Smith's ex'r* v. *Vertrees, &c.*, 2 Bush, 63.

DIVORCE.

1. See MARRIAGE (9 Bush, 696).

2. The wife did not obtain the life estate "in consideration or by reason of the marriage," within the meaning of the statute in this case—where the husband, during the marriage, in consideration of love and affection, conveyed real estate in trust for the use of his wife during life, remainder to his children. *Phillips* v. *Phillips*, 9 Bush, 183.

3. When it appears that the husband has abandoned his wife without good cause, with a fixed determination to separate from her, and refuses to provide for her, she is entitled to a divorce from bed and board; gifts of property, real and personal, to her by him, will not be restored to him; and she is entitled to the personalty left with her when he abandoned her; but he should not be compelled to provide for her further support. *Orr* v. *Orr*, 8 Bush, 156.

4. Divorce from bed and board does not bar curtesy, dower, or distributive right. (Sec. 8, art. 3, chap. 52, Gen. Stat., 526.) *Rich* v. *Rich, &c.*, 7 Bush, 53.

5. Confirmed habit of drunkenness of the husband for not less than one year, with a wasting of his estate (his mental and physical faculties may be his only estate), and without any suitable provision for the maintenance of his wife and children,

authorize a divorce to the wife. The maintenance is an assured one from the husband's means, and not a precarious and contingent expectancy from his or her father's kindred. *Shuck* v. *Shuck*, 7 Bush, 306.

6. Resident wife may sue non-resident husband for a divorce, and no bond is required in such case. *Rhyms* v. *Rhyms*, 7 Bush, 316.

7. A divorce restores the wife's right to immediate possession of her land, theretofore conveyed by her husband only, and destroys his potential right to curtesy. *Hays* v. *Sanderson and wife*, 7 Bush, 489.

8. A judgment for divorce cannot be reviewed or reversed. *Whitney* v. *Whitney*, 7 Bush, 520.

9. After divorce from bed and board, the wife married another man. The husband then sued for and obtained a judgment of divorce *a vinculo*, and for all property which she had received from him by reason or in consideration of the marriage. Property previously conveyed by him to a trustee for her, upon a compromise of her suit for the divorce from bed and board and alimony, cannot be recovered by him in said suit for property received by her by reason or in consideration of the marriage. *Flood* v. *Flood*, 5 Bush, 167.

10. A wife who voluntarily left her husband, and came to Kentucky under a belief that the husband would follow her, but he did not, is not entitled to a divorce on the ground of abandonment, without showing that, by the laws of the State she left, that is a ground of divorce. *Hick* v. *Hick*, 5 Bush, 670.

11. During the pendency of a suit for divorce by the wife who has abandoned her husband, an allowance *pendente lite* should be made to her, for her maintenance and that of her child; but compensation to her attorney cannot be provided for, *pendente lite*. *Cravens* v. *Cravens*, 10 Bush, 435.

12. Divorce from bed and board may be granted for any cause that the court in its discretion may deem sufficient. (Sec. 6, art. 3, chap. 52, Gen. Stat., 525.) *Shrock* v. *Shrock*, 4 Bush, 682.

13. A woman whose husband has been absent from the State of his residence for more than five years, without being heard from, is lawfully competent to marry again. (Sec. 10, art. 4,

chap. 29, Gen. Stat.) And a man concealing the fact that he had another wife in Texas, married a second wife in this State, and afterwards abandoned her. The Kentucky wife is entitled to alimony, and her allegation that she resided in Campbell county, without saying that it is in Kentucky, is sufficient. *Strode* v. *Strode*, 3 Bush, 227.

14. A woman having a suit for alimony and allowance therefor, may, pending her suit, make others parties, and recover from them money won from her husband on a horse-race; and a collusive release from the husband, *pendente lite*, will not avail. *Cain* v. *McHarry*, 2 Bush, 263.

15. As a general rule, the father is entitled to the custody of his infant child; but when it shall appear most beneficial for the child for the mother to have the custody, the chancellor will give it to her. *McBride* v. *McBride*, 1 Bush, 15.

16. In order for a husband to obtain a divorce on the ground of abandonment of the wife, or separation from him for more than a year, he must allege and prove that it was without his fault. *Epling* v. *Epling*, 1 Bush, 74.

DIVISION FENCES.

See DAMAGES.

DOGS.

If a dog be found roaming on a neighbor's premises, without the presence of his owner or keeper, his life is forfeited, if the owner of the premises chooses to exact the penalty. (Act Jan. 31, 1865, Myers' Sup., 189.) *Bradford* v. *McKibben*, 4 Bush, 545.

DONATION.

A promissory note given for a donation intended to be made to a charitable institution is obligatory, where its trustees are authorized to receive such donations: their obligation to apply the fund to the charitable purpose being a sufficient considera-

tion. (Collier v. Baptist Education Society, 8 B. Mon., 68.) *Trustees Kentucky Female Orphan School* v. *Fleming, ex'r, &c.*, 10 Bush, 234.

DOWER.

1. See LIEN.

2. A deed actually fraudulent, and declared void at the suit of creditors, does not deprive the wife of her right to dower. *Kueven, &c.* v. *Specker, &c.*, 11 Bush (March 4, 1875).

3. Homestead exemption, after the death of the husband, continues for the benefit of his widow and children, but shall be estimated in allotting dower. *Gasaway, &c.* v. *Woods, &c.*, 9 Bush, 72.

4. Under the homestead exemption act of February 10, 1866, if one-third of deceased debtor's land is of less value than $1,000, the widow is entitled to have allotted to her, as for her dower, so much of the land, including the homestead, as is of that value. *Gasaway, &c.* v. *Woods &c.*, 9 Bush, 72.

5. Dower of surviving wife is not barred by a conveyance executed by husband and wife which is set aside as fraudulent. *Lockett's adm'x* v. *James, adm'r, &c.*, 8 Bush, 28.

6. Where the wife signed her name to a deed which her husband had executed, and was privily examined, and she consented to its being put to record, but her name was not mentioned in the deed, it did not divest her of her potential right to dower in the trust property. *Prather, &c.* v. *McDowell, &c.*, 8 Bush, 46.

7. Testator devised land to his son, subject to his mother's life estate. Son died, leaving widow and mother surviving him, having disposed of his interest in the land. Not having had a right to the actual seizin during his mother's life, his widow was not entitled to dower in the land. *Butler, &c.* v. *Cheatham*, 8 Bush, 594.

8. A widow having a right to dower cannot, under the act of 15th February, 1856 (Myers' Sup., 751), have the property sold, on the ground that her dower cannot be assigned therein without materially impairing the value of the whole estate. *Liederkranz Society* v. *Beck*, 8 Bush, 597.

9. Dower is not barred by a divorce *a mensa et thoro*. *Rich* v. *Rich*, 7 Bush, 53.

10. A wife who is separated from her husband, and not occupying the mansion house at the time of his death, and not proposing to occupy it, is only entitled to dower by having one-third of the annual value of the dowable property appropriated to her in money—it being impracticable to allot dower to her in the usual mode. *Same*, 53.

11. Risk held a title bond for land. It was sold under a judgment to pay attaching creditors and residue of vendor's lien, and the money distributed amongst the creditors. The wife is not entitled to dower in the land; but if any remedy, it is against the attaching creditors. *Tisdale* v. *Risk*, 7 Bush, 139.

12. A conveyance executed by husband and wife, which is afterwards adjudged to be within the operation of the statute of 1856, will bar her dower. The act alluded to is the act against fraudulent conveyances in contemplation of insolvency. (Art. 2, Gen. Stat., chap. 44, page 490.) *Cantrill* v. *Risk*, 7 Bush, 158.

13. Dower in stock of the L. & N. R. R. Co., was assigned to a widow; but by act of March 22, 1871, such stock is declared personalty. *Copeland* v. *Copeland, &c.*, 7 Bush, 349.

14. In case of a contract to pay an annuity in lieu of dower, if the husband dispose of his property and thereby prevent its enforcement, it is such an equitable eviction as entitles her to dower; or she may become a creditor of his estate, and enforce the claim for the annuity as such. *Garrard, &c.* v. *Garrard, &c.*, 7 Bush, 436. In this case, it was decided that she had no lien on the estate of T. L. Garrard, the husband; but as the lands had been conveyed to his children without any valuable consideration, her claim was enforceable against the land, under sec. 2, chap. 40, Rev. Stat.

15. Where the husband leaves this State, and remains absent for seven years, his wife is entitled to dower in the lands he had owned and sold without her concurrence during coverture, unless it is shown that he was alive within that time. *Foulks* v. *Rhea*, 7 Bush, 568. (Sec. 16, chap. 37, Gen. Stat., 412.)

16. Fradulent deed in which the wife joined does not bar her dower, if set aside at the instance of creditors. (*Lowry* v. *Fisher*,

2 Bush, 70.) But if she fails for three years to prosecute an appeal, if the judgment be against her right, she will be barred of her right to review the judgment or to prosecute an appeal. *Dugan* v. *Massey, &c.*, 6 Bush, 81.

17. Deed not recorded within eight months does not bar dower. *McGuire* v. *Bowman, &c.*, 6 Bush, 550.

18. Where a testator makes a devise to one for life, and the remainder to those who would take under the laws of descent from the holder of the life estate, his widow is entitled to dower. *Jacob* v. *Jacob, &c.*, 4 Bush, 112.

19. The right to relinquish jointure and claim dower within twelve months after a husband's death, by his wife, under sec. 7, chap. 47, Rev. Stat. (2 Stanton, 26), does not embrace contracts between husband and wife to settle existing causes of litigation. *Loud* v. *Loud, &c.*, 4 Bush, 453.

20. The owner of four hundred acres of land sold off one hundred acres. The widow's dower should be assigned out of the residue. *Morgan and wife* v. *Conn*, 3 Bush, 58.

21. The real estate of deceased husband having been sold without assignment of dower to widow, she should have an annuity for her probable expectancy of life, according to the rule laid down by this court in *O'Donnell* v. *O'Donnell's ex'r*, 3 Bush, 216, and tables in same volume.

22. A deed was set aside as fraudulent in which the wife did not join; she was a party to the suit, and filed an answer and alleged that, in another deed, she had relinquished her dower in the land. This deed was not recorded, nor filed in the suit. After her husband's death, she was estopped from recovering dower from the purchaser, under the decretal sale setting aside the first named deed. *Craddock* v. *Tyler, &c.*, 3 Bush, 360.

23. Recognition and enjoyment of an abortive allotment of dower, for more than twenty years, precludes purchasers subject to the dower from changing or disturbing the boundary so defined. *Hibbs, &c.* v. *Evans*, 3 Bush, 661.

24. Courts, as matter of law and legal criterion, have adopted the American life annuity tables to determine the present value of life estates; and where the present value of a dower interest in the money for which the land sold—the money at the time of the husband's death being under the control of the court, and

loaned at interest—the widow is entitled to interest on the assignment made to her from the date of his death. *Alexander's ex'r* v. *Bradley*, 3 Bush, 667. See tables in first part of 3 Bush, for calculating life annuities.

25. A married woman who, at commissioner's sale under a decree of court, announces publicly that she will not claim dower against any person who should become the purchaser, is estopped from asserting her right thereto. *Connolly, &c.* v. *Branstler*, 3 Bush, 702.

26. Where administrator obtains judgment to sell the land of insolvent intestate to pay creditors, and the wife, although a party to the proceeding, does not answer and claim dower, she is entitled to its value out of the proceeds of the sales of the lands, and which the court should ascertain and cause to be paid to her; and her right to appeal will not be barred until three years after the judgment of distribution. *Merriwether* v. *Sebree, &c.*, 2 Bush, 232.

27. Widow is entitled to the use of one-third of the land, estimated according to quantity, quality, and value when allotted to her, except so far as it has been increased by improvements put upon it by the purchaser; and if the land is not sufficiently cleared, she has a right, so far as the full enjoyment of her estate as her home may require it, to clear and remove the timber and appropriate it to the expense of her necessary improvements. *Fritz* v. *Tudor*, 1 Bush, 28.

DRUNKENNESS.

1. See CRIMINAL LAW AND PROCEEDINGS.

2. Plea of, not sustained, if it appears that the obligor knew what he was doing when he signed the note. *Duker* v. *Franz, &c.*, 7 Bush, 274.

3. It satisfactorily appearing that defendant was drunk when he killed his father, court should have instructed the jury that in determining the question of malice and mitigation, the jury should consider the defendant's condition at the time of the homicide. *Curry* v. *Commonwealth*, 2 Bush, 67. But see *Shannahan* v. *Commonwealth*, 8 Bush, 463, which overrules the case of Smith v. Commonwealth, 1 Duvall, 224.

DUELLING.

1. The constitutional provisions relating to duelling are not self-executing, except to prevent holding office one who will not take the constitutional oath. *Commonwealth* v. *Jones*, 10 Bush, 725.

2. A citizen, elected to office and willing to take the oath, may enter upon his duties without subjecting himself to indictment for usurpation of office, until he has been first indicted, etc., for the disqualifying offense. If he takes the oath falsely, he may be prosecuted for the crime thereby committed. *Commonwealth* v. *Jones*, 10 Bush, 725.

3. Sec. 20, art. 8, of the State Constitution, is of itself a perfect statute; and one violating its provision may be deprived of the right to hold office, independent of any legislative action on the subject. *Commonwealth* v. *Jones*, 10 Bush, 725.

4. A contesting election board cannot judge whether a candidate for office has been guilty of a disqualifying offense. One accused of such offense can only be tried by a jury, and court of competent jurisdiction. *Commonwealth* v. *Jones*, 10 Bush, 725.

ECCLESIASTICAL COURTS.

The constitution of the Presbyterian Church defines and prescribes the powers and gradation of courts in which the spiritual government of the church vests. 1st. The session; 2d. The presbytery; 3d. The synod; 4th. The general assembly. Each of these bodies above the session has appellate jurisdiction to affirm or reverse the judgment of the one next below it. The order of the synod directing the election of additional ruling elders in the Walnut Street Church, was contrary to the constitution of the Presbyterian Church, and not obligatory upon the session and congregation of said Church; and the persons claiming to have been so elected are not thereby constituted ruling elders, nor were they so constituted by the declaration of the general assembly. *Watson, &c.* v. *Avery, &c.*, 2 Bush, 332.

EJECTMENTS.

To maintain ejectment, the plaintiff must be vested with the legal title, deducible from the Commonwealth; or vested in the party by legislative enactment, by the consent or procurement of the owner of the soil; or by such a continued adverse possession as will vest the title in him. *West Covington* v. *Freking*, 8 Bush, 121. It cannot be maintained to recover the title and possession of a street or highway, dedicated to the public use. The remedy, in such cases, is by an injunction or indictment.

ELECTIONS.

1. The contesting election board has no power to enter into an original inquiry as to whether the person elected has, by participating in a duel, subjected himself to be deprived of the right to hold office. *Commonwealth* v. *Jones*, 10 Bush, 725.

2. The action of the contesting board within its jurisdiction is conclusive. But courts called on to enforce, or punish those who disobey, the judgments of the board, may inquire into and determine its jurisdiction in the particular case. *Commonwealth* v. *Jones*, 10 Bush, 725.

3. The contesting board has jurisdiction to determine whether the person elected has the constitutional qualifications. *Commonwealth* v. *Jones*, 10 Bush, 725.

4. The penalty imposed, by sec. 12, art. 13, chap. 33, Gen. Stat., for "stuffing" the ballot-box, should be construed to include delivering such fraudulent ballot to the judge who deposits it, or procuring another to practice the fraud, whether with or without a corrupt motive on the part of the one inserting the ballot. *Commonwealth* v. *Gale*, 10 Bush, 488.

5. The vote upon a school-tax in a district, under the act of March 11, 1873, is not an election. *Marshall* v. *Donovan, &c.*, 10 Bush, 681.

6. Examining board should examine poll-books in the election of county officers, compute the votes cast for the several candidates, and issue certificates in accordance with the result;

and the one receiving the highest number of votes should receive the certificate. The contesting board cannot award a certificate of election. The examining board can be compelled, by mandamus, to perform their duty, and issue the certificate to the person receiving the highest number of votes; and the fact that the certificate has been given to a person not entitled to it, is no reason for withholding the mandamus.

The statute does not require the leaves of the poll-book to be attached. The requirement that the clerk shall sign at the foot of every page his name, is directory to him, and is no cause for rejecting it if he has failed to do so, provided the authenticity of the page not so signed is established by legal and competent evidence—which in this case appears by its being sealed up, with the poll-book as part of it, and the votes on it included in the judges' certificate of the result of the election. The mandamus must issue against the persons composing the board at the time that it is issued. *Clark* v. *McKenzie*, 7 Bush, 523.

The contesting board can pass upon the legality of the votes, and reject such as are illegal. *Same*, 523.

7. A certificate of election, or even a commission, is not evidence, *prima facie*, of eligibility to the office. *Hoglan* v. *Carpenter*, 4 Bush, 89.

8. Under a special statute, which neither authorized nor required the examiners to do more than examine the poll-books, and report the number of votes cast for each candidate, said board had no right to decide by casting lots; the general statute regulating examining boards not being applicable to town elections. *Hammock* v. *Barnes*, 4 Bush, 390.

9. Upon indictment for receiving a bribe for his vote, the accused should not be convicted upon the evidence of a single witness, without strong corroborating circumstances. *Russell* v. *Commonwealth*, 3 Bush, 469.

10. Election, in its constitutional sense and meaning, is used to designate a selection by the popular voice of a district, county, town or city, or by some organized body in contradistinction to the appointment by some single person or officer. *Police Com'rs* v. *City of Louisville*, 3 Bush, 597.

11. To make an election by an organized body legal, its own existence as well as power to make the election must be legal; and when the officer whose election is prescribed by law is not strictly a town or city officer, his residence in the town or city is not necessary. Sec. 6, art. 6, State Constitution, has no application to such officer. *Same*, 597.

12. To render the judges of an election liable for rejecting the vote of a person offering to vote, it must be shown that they acted maliciously; and the action against them may show that the plaintiff was not entitled to vote; and his statements made at the time he left the State are competent to show his intention, and for what purpose he left the State. *Miller* v. *Rucker, &c.*, 1 Bush, 135.

13. In comparing polls for county judge, it is the duty of the county clerk to act, although he may have been a candidate at the same election; and if he refuse to act, may be compelled by mandamus to do so. *Cox, &c.* v. *Kash*, 1 Bush, 201.

EMBEZZLEMENT.

Sec. 2, art. 12, chap. 28, Rev. Stat., embraces all persons who are guilty of fraudulently secreting, or converting to their own use, the money or property of others, intrusted to them or placed in their hands for the purpose of being carried or delivered. *Johnson* v. *Commonwealth*, 5 Bush, 430. (See art. 12, sec. 2, chap. 29, Gen. Stat., 336.)

EQUITY, AND EQUITABLE DEFENSE.

1. See PURCHASER.

2. A prior equity with a legal advantage will not be disturbed in favor of a junior equity not more meritorious. (Russell v. Petree, 10 B. Mon., 186.) *Bettis* v. *Allen*, 10 Bush, 40.

3. A stale claim, not barred by the statute of limitations, is not enforced in this case. *Bettis* v. *Allen*, 10 Bush, 40.

4. It is a general rule, that notice of an outstanding equity applies to every one whose title comes to him affected with such notice. *Bank of America* v. *McNeil*, 10 Bush, 54.

5. Equitable defense must be made in ordinary action, otherwise it will be waived. (Civil Code, sec. 14.) *Thomasson* v. *Townsend*, 10 Bush, 114.

6. Penalties will not be enforced when compensation can be made. (Story's Eq. Jurisprudence, 1314.) *Thomasson* v. *Townsend*, 10 Bush, 114.

7. The chancellor, like a jury, must have such legal evidence of fraud, as will overcome the legal presumption of innocence, before he will be justified in finding its existence. *Marksbury, &c.* v. *Taylor, &c.*, 10 Bush, 519.

8. A claim for valuable and lasting improvements on property sued for, presents an equitable defense, for the trial of which the case should be transferred to the equity docket. *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

9. When the plaintiff is entitled to an inquiry of damages by a jury, and is deprived of this right by the court transferring the case to equity (having excepted to the order), he is not concluded by the judgment dismissing his petition, although he fails to take proof of his cause of action. *Creager, &c.* v. *Walker, &c.*, 7 Bush, 1. Equitable ownership of land is not a good defense to an action of trespass by the plaintiff in possession. *Same.*

10. A prior equity, with long possession, a good defense. *Faris and wife* v. *Dunn, &c.*, 7 Bush, 276.

11. The chancellor will not take money from one party and pay it over to others who have no better or more meritorious claim to it than he had. *Clore, &c.* v. *Bailey*, 6 Bush, 77.

12. Where defendant files two defenses, one legal and the other equitable, he has no right to transfer the whole case to the equity docket, but only the issue in equity. *Bennett and wife* v. *Titherington, &c.*, 6 Bush, 192.

13. A deed not lodged for record within eight months is good against a subsequent purchaser with legal notice; but not against a subsequent purchaser without notice, who has fully paid the purchase money. If only part of the purchase money be paid without notice, the last conveyance will constitute an equitable defense to an action of the first purchaser to recover the land. *Same.*

14. Pullen had a lien on two tracts of land, the property of the same debtor. Glass had a lien on one of the tracts, junior to Pullen's. He released the lien on the tract not subject to Glass' lien, which was more than sufficient to pay P.'s debt. Glass is entitled to be paid first out of the tract on which he held a lien. *Glass* v. *Pullen*, 6 Bush, 346.

15. No right of subrogation accrues to a surety who has not paid the debt. *Same.*

16. Separate estate of a married woman trading as a *feme sole*, under a deed conferring that right upon her, may be subjected to the payment of her debts created without writing. *Hackett & Callaghan* v. *Metcalfe, &c.*, 6 Bush, 352.

17. Persons of unsound mind, incompetent to take prudent care of themselves and property, are entitled to the protection of courts of equity. *Shaw, &c.* v. *Dixon, &c.*, 6 Bush, 644.

18. An oral agreement, fixing a dividing line between adjoining lands of antagonist parties, may be enforced in equity. *Jamison, &c.* v. *Petit*, 6 Bush, 669.

19. Any defendant has a right to demand the trial of issues which are purely equitable. *Commonwealth for Peters* v. *Bosley*, 5 Bush, 221.

20. A sheriff failed to collect or return an execution against the administrator of an estate, in favor of a receiver appointed by the court to receive and pay off designated creditors of the estate. Payments made by the administrator of some of these claims to the creditors were an equitable defense in favor of the sheriff and his sureties, in a suit brought to recover the amount of the execution and damages for failing to return within thirty days the execution. *Same.*

21. Party having occupied a tract of land for about seven years, and in good faith improved it, believing it to be his, being evicted by a superior title, is in equity entitled to the ameliorations, so far as his labor and money expended have enhanced the value of the land, to be estimated at the time of eviction. He is liable for the use of the land as unimproved by him, and annual interest on that value. *Pulliam, &c.* v. *Jennings*, 5 Bush, 433.

22. A husband induced his wife to sell her land and convert it into money, under a promise from him that he would purchase

with the proceeds another tract, and have it conveyed to her. His administrator filed a petition to have the land sold, to pay the husband's creditors (he having only a bond for a conveyance). Court of equity will require justice to be done to the wife, and prevent the conversion of the land contrary to the understanding between her and her husband. *Mallory* v. *Mallory's adm'r*, 5 Bush, 464.

ENTRY—FORCIBLE.

See FORCIBLE ENTRY AND DETAINER.

ESCAPES.

Whether the offense of which the prisoner was charged was a felony or a misdemeanor, it was the duty of the jailer to take him into custody, and keep him safely until he was lawfully discharged; and for failing to do so, he was liable to be indicted. *Commonwealth* v. *Mitchell*, 3 Bush, 30.

ESTATES TAIL.

In 1838, F. devised his estate to trustees and their successors forever, in trust for the use of his three daughters and their posterity forever; and if either should die without lawful issue, her part to go in trust for the survivors to be held in the same way. He expressed a hope that his wishes as to the manner in which the estate devised should be held and managed, should be obeyed in all time to come. This devise created estates tail, which, by the act of 1796 of the Legislature of this State, were converted into estates in fee simple. *Breckinridge and wife* v. *Denny & Faulkner*, 8 Bush, 523.

ESTOPPEL.

1. Estoppel is not constituted by statements made by a party by mistake, which were not intended to and did not influence

the conduct of others, or lead them into a line of conduct prejudicial to their interests. *McAdams' executors, &c.* v. *Hawes*, 9 Bush, 15.

2. Sureties in the bond of a city treasurer are estopped from showing that his election was unauthorized. *City of Paducah* v. *Cully, &c.*, 9 Bush, 323.

3. The corporation is not estopped by the acts of individual stockholders, who, being admitted as parties to a suit wherein the corporation was a party, filed pleadings therein for themselves only. *Covington and Lexington Railroad Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

4. Parties and privies are estopped by deed. *Mershon, &c.* v. *Mershon*, 9 Bush, 633.

5. A recital in a mortgage, admitting that the grantor owned one-third of the land described in the mortgage, neither affirms nor admits that the title to any part of the residue was in another person. *Ibid.*

6. Possession of the land by grantor, with oral agreement that he was to hold possession thereof during his life, was not adverse to the grantee; and the grantor is estopped from setting up an adversary title. *Carpenter, &c.* v. *Carpenter*, 8 Bush, 283.

7. The heir is not estopped from controverting the will of a married woman, by acquiescing in her intention of making a will and by recognizing it as valid after her death—he not having induced her to make the will, nor induced her to refrain from disposing of the property by the deed of herself and husband. *Mitchell and wife* v. *Holder &c.*, 8 Bush, 362.

8. By uniting in a conveyance of a tract of land by one having a contingent interest therein, will not estop him from asserting his claim against another who bought without his encouragement other land in which he held a like interest. *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

9. The husband joined his infant wife in an antenuptial conveyance of her real estate to a trustee, for the sole benefit of the wife. By concurring in the deed of trust, the husband was estopped from asserting claim to the real estate after the same had been, without his concurrence, sold and conveyed by the trustee after the wife arrived at full age, with her concurrence. *Duvall and wife* v. *Graves, &c.*, 7 Bush, 461.

10. Distributees are estopped from asserting claim against the executor on account of money paid by him—with their knowledge, consent, and approbation—to persons who were believed to be, but were not, distributees under the will. *Hopson's ex'r* v. *Commonwealth for use of Shipp, &c.*, 7 Bush, 644.

11. R. stood by and approved of a sale and conveyance of his interest in a tract of land, by his mother, to W. W.; in consideration whereof he conveyed another tract to R.'s children. R.'s children sold the land conveyed to them, and sued for their father's interest in the land conveyed to W. W. R. and his children were estopped from recovering the land conveyed to W. W. *Foster* v. *Shreve*, 6 Bush, 519.

12. Parties are estopped to deny the constitutionality of a local act of the Legislature, by participating in the procurement of its passage; by ratifying, acquiescing in or approving it after its passage, and by becoming recipients of benefits under it. *Ferguson, &c.* v. *Landram, &c.*, 5 Bush, 230.

13. Parties to written contracts, without allegations of fraud or mistake, are concluded by and estopped from denying the statements contained in the writings. *Rau & Rieke* v. *Boyle & Boyle*, 5 Bush, 253.

14. A forthcoming bond executed by a third party recited that "it being the property of the execution defendant;" he is estopped to deny it, on a suit on the bond. *Sparks* v. *Shropshire*, 4 Bush, 550.

15. If one of the parties to a bill negotiate it with a forged indorsement, he cannot contest the genuineness of the indorsement, in an action by the holder. *Burgess* v. *Northern Bank of Ky.*, 4 Bush, 600.

16. Land, to which the wife had not relinquished her potential right to dower, was sold under a decree setting aside a fraudulent deed of the husband. The wife filed an answer, and said that she had relinquished her right of dower, in another deed. She was thereby estopped from recovering dower in the land sold at the decretal sale. *Craddock* v. *Tyler, &c.*, 3 Bush, 360.

17. If a party having an interest in preventing an act being done, acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by giving

credit to his sincerity, he cannot challenge the act to their prejudice; and this is so, where the party complaining of the act to his prejudice has procured it to be done, by a representation of facts inconsistent with the subsequent claim. Married women are not exempt from this rule. *Stone and wife* v. *Werts, &c.*, 3 Bush, 486.

18. Where the husband's real estate is sold publicly, by a commissioner under a decree of court, and the wife announces publicly at the time of sale "that she would not claim dower against any person who should purchase the estate," she is estopped from recovering it. *Connelly, &c.* v. *Branstler*, 3 Bush, 702.

19. A division of slaves long acquiesced in, and ratified by acts of open and notorious ownership, should estop parties and those claiming under them from disturbing the division. *Smith and wife* v. *Payne*, 2 Bush, 583.

20. The mortgagor, who directed encumbered real estate to be levied on by the sheriff, was present at the sale, and made no mention of the encumbrance, is not estopped from asserting his right of redemption. *Sandford* v. *Farmers' Bank, &c.*, 1 Bush, 335.

21. Under the combined operation of privity and estoppel, a party is estopped from claiming an interest in land acquired after his sale and conveyance, which was supposed to be passed thereby. *Churchill, &c.* v. *Terrell*, 1 Bush, 54.

ESTRAYS.

At the expiration of two years without demand by the owner, the title to an estray horse passes to the taker up, subject to the assessed value to the owner. The poster having disposed of the horse before the two years expire, the owner, by making a demand within the time, may recover the horse from any person in possession of him. The sale of the poster's prospective title at the expiration of the two years without demand, divested the owner of his right to the horse, and substituted a right to its reported value, and the poster's liability to a fine. *Hudson* v. *Agee and Son*, 6 Bush, 366.

EVIDENCE.

1. See CRIMINAL LAW AND PROCEEDINGS; and NEGLIGENCE.

2. Because a mortgage is beneficial to a non-resident mortgagee and to resident co-mortgagees, delivery and acceptance will will not be presumed—especially where the mortgagee did not actually accept it, and had no knowledge or information as to its provisions until more than eight years after it was put to record. *Bell* v. *Farmers' Bank, &c.*, 11 Bush (Feb. 15, 1875).

3. What is evidence before a jury, where the act complained of depends upon whether the possession of land is adverse or as tenant. *Roberts* v. *McGraw, &c.*, 11 Bush (March 11, 1875).

4. The ruling of the court below in refusing to admit as evidence the record of another suit must be sustained—where said record is not made part of the bill of exceptions, and the latter contains no proof of the privity of the parties in the two suits or other reason for its introduction. *Roberts* v. *McGraw, &c.*, 11 Bush (March 11, 1875).

5. An administrator is not competent as a witness against the infant heirs of estates in their hands. (Gen. Stat., 413.) *Wilson, guardian, &c.* v. *Unselt's adm'r, &c.*, 11 Bush (Nov. 13, 1875).

6. Where part of a confession is in evidence, the accused has the right to the entire conversation relative to the matter in issue. (1 Greenleaf on Evidence, 218.) *Berry* v. *Commonwealth*, 10 Bush, 15.

7. The testimony of a witness called to prove a confession is inadmissible, if he does not remember all the conversation, or at least the substance of all that was said at the time on the subject. *Berry* v. *Commonwealth*, 10 Bush, 15.

8. The renewal of a note by the same parties is merely a change of the evidence of indebtedness, and does not release a pledge made to secure it. *Bank of America* v. *McNeil*, 10 Bush, 54.

9. The testimony of a deceased witness, given at a former trial of the same case and same issue, is competent evidence on a subsequent trial. *Kean* v. *Commonwealth*, 10 Bush, 190.

10. The written statement in a bill of exceptions of the testimony of the deceased witness on the former trial, is not admissible in a criminal prosecution as evidence of the substance of that testimony, being in violation of the constitutional right of the accused to meet the witness face to face. (Kentucky Constitution, sec. 12, art. 13.) *Kean* v. *Commonwealth*, 10 Bush, 190.

11. The substance of the testimony of a deceased witness may be proved by persons who were present at the former trial and heard it. *Kean* v. *Commonwealth*, 10 Bush, 190.

12. But evidence in a bill of exceptions may be read in a civil action, when the witness is dead and a re-trial has been ordered. *Kean* v. *Commonwealth*, 10 Bush, 190.

13. Proof that the family or associates of a witness are in bad repute, is inadmissible to impeach his character. *Kean* v. *Commonwealth*, 10 Bush, 190.

14. Where witness for the prosecution remembered only part of a confession, the accused had a right to introduce witnesses to prove the whole, unless he himself drew forth the statement from the prosecuting witness. *Coffman* v. *Commonwealth*, 10 Bush, 495.

15. Evidence of fraud is the same in equity as at law. *Marksbury, &c.* v. *Taylor, &c.*, 10 Bush 519.

16. Hearsay evidence is incompetent to establish a fact which may be proved by witnesses who speak from their own knowledge. (1 Greenleaf on Evidence, 99.) *Bradshaw* v. *Commonwealth*, 10 Bush, 576.

17. In cases of homicide, contemporaneous expressions of the parties may be proved to illustrate the character of the act; but the cries of bystanders, not concerting with either party, are not part of the *res gestæ*. *Bradshaw* v. *Commonwealth*, 10 Bush, 576.

18. No case can arise where one party to an issue is allowed to testify as to matter affecting his adversary, and the latter is not permitted to testify as to the same matter. *Love* v. *Cummings*, 10 Bush, 578.

19. One of two partners mortgaged his interest in the partnership and left the State, and the mortgagee brought suit to foreclose against him by constructive service, and against his

partner by actual service of process. The latter partner answered, alleging an indebtedness to him. *Held*, that the remaining partner was competent to prove the nature of his claim; but neither he nor the mortgagee was a competent witness as against the defendant constructively served. (See sec. 27, chap. 37, Gen. Stat.) *Love* v. *Cummings*, 10 Bush, 578.

20. The rules and regulations of the U. S. Treasury Department are not admissible as evidence in this case, although it is proper for the court to consider such of them as are pertinent, and base instructions thereon. *Macklin* v. *Frazier*, 9 Bush, 3.

21. Dying declarations are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. *Leiber* v. *Commonwealth*, 9 Bush, 13.

22. Evidence of such declarations should be restricted to the act of killing, and the circumstances immediately attending it and forming a part of the *res gestæ*. *Leiber* v. *Commonwealth*, 9 Bush, 13.

23. The *ex parte* statements or protest of the officers of a boat navigating the inland waters of this country, in relation to any disaster which may have happened to the boat, although verified by them and important for certain purposes, cannot be used as evidence in chief, in an action for damages against the owners of the boat, or in any action (except against themselves) in a court of this State. *Murphy* v. *May*, *&c.*, 9 Bush, 33.

24. Before evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning the same, with the circumstances of time, place, and persons present as correctly as the examining party can present them; and if it is in writing, it must be shown to the witness and he be allowed to explain it. (Code, sec. 662; 1 Greenleaf, 463.) *Murphy* v. *May*, *&c.*, 9 Bush, 33.

25. Facts assumed in an instruction must be sustained by the evidence. *Murphy* v. *May*, *&c.*, 9 Bush, 33.

26. A published map of a town must be taken as the written and recorded representations of the town. *Memphis & St. Louis Packet Co.* v. *Grey*, 9 Bush, 137.

27. An opinion of a witness is not competent evidence. *Johnson* v. *Commonwealth*, 9 Bush, 224.

28. The admission of incompetent evidence in criminal cases is a sufficient ground for reversal. *Johnson* v. *Commonwealth*, 9 Bush, 224.

29. A pamphlet containing the private instructions of an insurance company to its agents is not evidence in its behalf; nor is a letter from one of its agents to another. *Mississippi Valley Life Ins. Co.* v. *Neyland*, 9 Bush, 430.

30. Phonographic report of testimony should not be sent to the jury without the consent of the parties. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Cavens' adm'r*, 9 Bush, 559.

31. A paper tending to disprove the contract asserted by the plaintiff, having been in his possession, is admissible as evidence against him. *Booth's ex'r* v. *Vanarsdale*, 9 Bush, 717.

32. A witness is not incompetent by reason of his wife's interest in the matter in litigation. *Ibid.*

33. A married woman is in no case a competent witness for or against her husband. *Ibid.*

34. When the wife is the real party in interest, she may testify, or elect to have her husband testify. *Ibid.*

35. A widow having no interest in a suit between her husband's executor and another, is a competent witness for the executor. *Booth's ex'r* v. *Vanarsdale*, 9 Bush, 717.

36. Parol evidence of the intention of a testator is inadmissible to construe a will, if there is no latent ambiguity. *Fogle's ex'r* v. *Fogle*, 9 Bush, 721.

37. Remarks made, during and immediately after an assault, by two of the witnesses who rescued the boy from a brutal attack, properly admitted as a part of the *res gestæ*. *Sherley, &c.* v. *Billings*, 8 Bush, 147.

38. "Where the evidence is conflicting, the one side being of an affirmative and the other a negative character, the affirmative character is preferred, and is entitled to the greater weight by the jury in making up their verdict"—is abstract, and should not be given. *Louisville Chemical Works* v. *Commonwealth*, 8 Bush, 179.

39. Declarations made by the grantor remaining in possession after he had executed the deed, in relation to the manner of his holding and the character of his title, are incompetent against

the grantee, unless such declarations were made in his presence. *Carpenter, &c.* v. *Carpenter*, 8 Bush, 283.

40. A surviving wife is a competent witness in behalf of the administrator of the estate of her deceased husband, when she is not interested in the result of the suit, to prove facts which came to her knowledge during the life of her husband, but not by reason of her confidential relations with him as his wife. *English's adm'r* v. *Cropper*, 8 Bush, 292.

41. On a plea of payment, evidenced by checks after the date of the note sued on, and a letter written by plaintiff to defendant asking for a loan of money, were competent to go to the jury for defendant. *Elbert* v. *McClelland, &c.*, 8 Bush, 577.

42. Lapse of time short of the statutory bar is not of itself presumptive evidence of payment. *Poston* v. *Smith's ex'r*, 8 Bush, 589.

43. Statements of decedent as to the relations a female sustained to him, are competent evidence on the trial of the question whether decedent died without lawful issue. *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

44. An auctioneer's memorandum is evidence of the sale of real estate. *Gill* v. *Hewett*, 7 Bush, 10.

45. Newly discovered evidence which would be unavailable on the trial, is no ground for setting aside an order of submission; and to establish heirship, the facts must be averred and proved if not admitted. *Larue, &c.* v. *Hays, &c.*, 7 Bush, 50.

46. When a contract is infected with usury or fraud, parol proof may be admitted to show its real character is different from what it purports on its face. *Ferguson's adm'x, &c.* v. *Smith*, 7 Bush, 76. (5 Littell, 84; 14 B. Mon., 624.)

47. The court should say what evidence is competent, and what is to be excluded. *Becker, &c.* v. *Crow, &c.*, 7 Bush, 198.

48. Confessions are the most dangerous species of testimony held competent by the law; but if the confessions or threats are established by the concurring testimony of a number of disinterested witnesses, the story they tell probable in its nature, consistent, and reasonable, the objection ceases. *Same*, 198.

49. An unrecorded will is evidence of the acknowledgment of the indebtedness of decedent to the person mentioned. *Thomas, &c.* v. *Arthur*, 7 Bush, 245. (4 B. Mon., 471.)

50. A devise to one in trust for another may be established and enforced on oral testimony. *Caldwell, &c.* v. *Caldwell*, 7 Bush, 515.

51. That the execution of a note sued on was procured by fraud or oppression, must be sustained by evidence of the defendant. *Thompson, &c.* v. *Wharton*, 7 Bush, 563.

52. That a record is lost or destroyed must be clearly established, before proof of its contents by secondary testimony can be admitted. *Penny, &c.* v. *Pindell, &c.*, 7 Bush, 571.

53. Confessions of a defaulting agent of a railroad company, after his discharge from its service, are not evidence against his surety on his bond for faithful performance of his duties as agent. *Pollard* v. *Lou., Cin. & Lex. R. R. Co.*, 7 Bush, 597. But with regard to entries made in the course of his duty they are admissible. (1 Greenleaf on Evidence, sec. 187; 7 B. Mon., 447.) *Idem*, 597.

54. Recitals in a deed are *prima facie* evidence that given amounts were paid by the person named, but susceptible of explanation by other or parol evidence; and a partner whose interest was levied on in real estate, although a party to the suit, is a competent witness for his co-partner, to show that he had advanced the money paid on the said real estate. *Bryant* v. *Hunter, &c.*, 6 Bush, 75.

55. To entitle a party to a new trial on the ground of newly discovered evidence, the evidence must be of such an unerring and permanent character as to preponderate greatly or have a decisive influence upon the evidence to be overturned by it. *Allen* v. *Perry*, 6 Bush, 85.

56. When a writing only purports to express part of the contract, or is expressed in such short and incomplete terms as to render parol evidence necessary to explain what is unintelligible, then the residue of the contract may be shown by extrinsic evidence. *McKegney* v. *Widekind & Co.*, 6 Bush, 107. (Greenleaf on Evidence, sec. 282.)

57. The statements of a married woman while in possession of property were clearly admissible to show the character of her title, and how she claimed it. *Commonwealth for Bennyworth, &c.*, v. *Fletcher, &c.*, 6 Bush, 171.

58. In ordinary proceedings, either party may introduce his adversary as a witness. (Civil Code, sec. 673.) *Hester* v. *Wallace*, 6 Bush, 182. But is not the section 673 dispensed with by the new testimony bill, which provides that no person shall be disqualified as a witness in a civil action, etc., by reason of his interest in the event of the suit, etc.? (Gen. Stat., sec. 22, chap. 37, page 413.) EDITOR.

59. A parol vendor of land is a competent witness for his vendees, to prove the contract under which they were in possession. *Crawford* v. *Woods, &c.*, 6 Bush, 200.

60. Records fix the date of events, with more reliable certainty than the memory of any number of witnesses. *Selman and wife* v. *Lee's heirs*, 6 Bush, 215.

61. A current rumor, to show the probable motive of an act subsequently done, is not admissible unless it is shown that the rumor had been communicated to the party before he committed the act. *St. Louis Mut. Ins. Co.* v. *Graves*, 6 Bush, 268.

62. The opinions of witnesses, not founded on science, but as a mere theory of morals or ethics, whether given by professional or unprofessional men, are inadmissible as evidence. *Same*, 290. The opinion of a physician, that no sane man in a Christian country would commit suicide, is inadmissible. *Same*, 290.

63. Evidence of the good character of the prisoner is admissible, and until introduced, witnesses as to the general bad character will not be allowed. Evidence of bad character must be confined to the trait of character in issue. *Young* v. *Commonwealth*, 6 Bush, 312.

64. The regular mode of examining into the general reputation of a witness, is to inquire of the impeaching witness whether he knows his general character amongst his neighbors. If he answers affirmatively, he should be asked what that reputation is; and if he states that he does not know his reputation amongst his neighbors at the time he is examined, he should not be permitted to testify; although the witness may have known his reputation where he formerly lived, that will not be sufficient, nor should he be permitted to speak of particular acts. *Same*, 312.

65. The person wounded said, at the time he made the declarations against prisoner, that he believed that he would not die

of the wound. But afterwards repeated the declarations, and said he believed he would die of the wound, and explained why he said at first that he did not believe that he would die. *Held*—that his declarations should have been admitted. *Same.*

66. The court should prevent unfairness or misconduct of witness, and not substitute jury to determine such matters. *Same.*

67. Trustee is incompetent to testify in his own behalf. *Graves* v. *Mattingly*, 6 Bush, 361. Otherwise now, under the new testimony act.

68. Indorsement of partial payment on a note, shown to have been made by obligee in lifetime of obligor, is competent evidence that the amount indorsed was then paid and residue remained unpaid, so as to prevent the bar of the statute of limitations. *Hopkins, &c.* v. *Stout*, 6 Bush, 375.

69. A judgment against the administrator is *prima facie* evidence against the heirs, to subject land descended to them to payment of the debt. *Same.*

70. An admission of non-payment in a plea of limitations does not prevent the statutory bar. *Same.*

71. President of a bank's statement that a bill was paid or taken up at his bank with a new bill, was evidence of payment, although the witness had never seen the bill with which the payment was made. *Edelen* v. *White*, 6 Bush, 408.

72. That an indictment was presented to the court by the grand jury can only be proved by the order of court. *Commonwealth* v. *English*, 6 Bush, 431.

73. Copy of settlement of accounts of trustee before county court in which the deed of trust was properly recorded, is evidence in a controversy between trustee and beneficiary. *McAfee, trustee, &c.* v. *Balden, &c.*, 6 Bush, 537.

74. Where there are two trials, if a witness has died between the first and second trials, it may on the second be proved what he swore to on the first. It applies as well to criminal as civil cases. *O'Brian* v. *Commonwealth*, 6 Bush, 563.

75. On the issues of not guilty and justification, in an action of slander, the plaintiff may prove good character. *Horton* v. *Banner*, 6 Bush, 596.

76. Vendor of property can prove title in his vendee, but is incompetent as a witness for his levying creditor, who offers him on the assumed ground of fraud. (16 B. Mon., 492.) *Weil & Bro.* v. *Silverstone, &c.*, 6 Bush, 698.

77. Party taking a deposition and declining to read it, the adverse party may read such deposition—although the witness would have been incompetent if offered by him. *Same*, 698.

78. Declarations made by the purchaser of goods relative to and contemporaneous with his acts in removing the goods, are admissible against him as part of the *res gestæ*. *Same*, 698.

79. The court should not say to the jury, "that when witnesses are equally credible, the greatest weight ought to be given to those who have the best opportunity to learn and know the material facts." *Same*, 698.

80. A witness is asked if he has an interest in his father's estate, under his will. By answering in the negative, he discharges himself, and is not compelled to produce a copy of the will. *Nutall's adm'r* v. *Brannin's ex'rs*, 5 Bush, 11.

81. Witness had delivered a letter to one of his attorneys, who said "he could not find it and that it was lost." Not sufficient to admit secondary evidence of its contents. *Same*, 11.

82. The widow who was sued for money deposited by her husband with her during the marriage, asked for the declaration of the husband, and witness answered without objection. She cannot object, after getting the answer, that it is illegal; and her own statements during the marriage on the subject are evidence against her. *Cook* v. *Burton's adm'r*, 5 Bush, 64.

83. One co-plaintiff who assigns his interest to his co-plaintiff, not competent. *Rau & Rieke* v. *Boyle & Boyle*, 5 Bush, 253. See now, the new testimony bill, sec. 22, chap. 37, Gen. Stat., 413.

84. A settlement and report made by two persons appointed for that purpose, showing balance of county levy due by the sheriff, is *prima facie* evidence against the sheriff and his sureties. *Commonwealth, &c.* v. *Gabbert's adm'r, &c.*, 5 Bush, 438.

85. Defendants cannot introduce evidence to contradict admissions in the answer. *Sandford, &c.* v. *Smith*, 5 Bush, 471.

86. Party answering interrogatories may, on the trial of the action, read his answer as a deposition. *Ecklar* v. *Galbreath*, 5 Bush, 617.

87. Statements made by witness on his *voir dire*, are not evidence for the jury. *Whitaker* v. *Crutcher*, 5 Bush, 621.

88. An agreement between principal in a supersedeas bond and his surety, that others were to sign it before it became binding, unless communicated to the clerk, who took the bond, not admissible. *Same*, 621.

89. Objections to authentications may be answered by presumptions arising from lapse of time. *Rutherford's heirs* v. *Clark's heirs*, 4 Bush, 27.

90. Declarations of parents in their lifetime, that they were married, admissible to prove legitimacy of their issue. In the absence of evidence to the contrary, a child *eo nomine* is legitimate, and the evidence repelling such presumption must be strong, satisfactory, and conclusive. *Dannelli, &c.* v. *Dannelli's adm'r*, 4 Bush, 51. This case overrules the case of Remington v. Lewis, upon this point, in 8 B. Mon., 611.

91. Assignment of certificate of purchase dated anterior to the conveyance, is no evidence against persons not parties to the assignment, when assailed as fraudulent by creditors. *Jarboe, &c.* v. *Colvin, &c.*, 4 Bush, 70.

92. Recitals in deeds and writings are not evidence, when assailed by creditors as fraudulent; and similarity of interest of a witness, having an action of same character, goes to the credibility of the witness only. *Same*, 70.

93. Certificate of election or even commission is not *prima facie* evidence of eligibility to office. *Hoglan* v. *Carpenter*, 4 Bush, 89.

94. An insufficient denial in answer dispenses with proof. *Moorman* v. *Beauchamp*, 4 Bush, 145.

95. An allegation in the answer that a lien had been waived, is not sufficient without proof. *Same*, 145.

96. The rule which required two witnesses, or one with strong corroborating circumstances, to overcome a denial in an answer in chancery has been changed by sec. 142, Civil Code. *Worley* v. *Tuggle, &c.*, 4 Bush, 168. (17 B. Mon., 644; 1 Met., 354.)

97. Stockholder in a bank is a competent witness for the bank. *Petitt & Co.* v. *First National Bank of Memphis*, 4 Bush, 334. (See sec. 22, chap. 37, Gen. Stat., 413.)

98. Recital in a deed, of consideration paid for land, is no evidence as to third parties and strangers to the transaction. *Goins* v. *Allen, Morton & Co.*, 4 Bush, 608.

99. Copy of deed acknowledged and certified by mayor of Philadelphia in 1807, and recorded in proper office in Kentucky in 1819, proper evidence. *Patterson, &c.* v. *Hansel*, 4 Bush, 654.

100. What a witness swore to, on the examining trial, should not be admitted, unless his attendance on the final trial is impossible. *Dye* v. *Commonwealth*, 3 Bush, 3.

101. Jurors are not competent to explain the grounds of their finding, or to impeach verdict. *Commonwealth* v. *Skeggs*, 3 Bush, 19.

102. Defendants having an interest in the subject of litigation in common with plaintiff are competent for the other defendants; but where the evidence of one defendant will exonerate all, then it is incompetent. *Mason, &c.* v. *Mason, &c.*, 3 Bush, 35. (See sec. 22, chap. 37, Gen. Stat., 413.)

103. Deposition of divorced man competent against his late wife, when it does not divulge communication made during coverture. *Storms, &c.* v. *Storms, &c.*, 3 Bush, 77.

104. To impeach credit of a witness, the evidence must be confined to his general reputation. *Taylor* v. *Commonwealth*, 3 Bush, 508.

105. What justice has set down in writing, on the examining trial, may be used to show his imperfect recollection when he is called to testify what witnesses swore to on the trial. *Lanham* v. *Commonwealth*, 3 Bush, 528.

106. Where records of clerk's office are burned, secondary evidence may be used; but it does not dispense with proof that conveyances were made and legally acknowledged. *Calhoon* v. *Belden*, 3 Bush, 674.

107. Insufficient allegations cannot be supplied by evidence. *Southwood* v. *Myers*, 3 Bush, 681.

108. [No further mention will be made, of cases deciding as to the incompetency of witnesses on account of interest. The rule has been changed by sec. 22, chap. 37, Gen. Stat., 413.]

109. A negro is incompetent to testify against a white man, under the laws and in the courts of Kentucky. *Bowlin* v. *Commonwealth*, 2 Bush, 5. [This is altered by statute, since 1871.]

110. Renewal of a note is only a change of the evidence of the debt, and not a satisfaction of it. *Lowry* v. *Fisher, &c.*, 2 Bush, 70.

111. Attesting witnesses to a will, who depose contrary to the testator's capacity, are entitled to but little credence. *McMeekin, &c.* v. *McMeekin*, 2 Bush, 79.

112. In an action on an account filed with the petition, when the alleged indebtedness is not controverted by an answer, judgment should be rendered without proof. (15 B. Mon., 628.) *Wood* v. *Wells, &c.*, 2 Bush, 197.

113. Statements of testimony of a deceased witness contained in a bill of evidence, are entitled to as much verity as the oral testimony of any witness to establish such evidence. *Cantrell* v. *Howlett, &c.*, 2 Bush, 311.

114. A party who authorizes his name to be used as a partner in a transaction, is estopped to deny it when sued for the consideration of a sale made on the faith of his being a partner. *Walrath* v. *Viley*, 2 Bush, 478. And if a deposition which will not change the result be rejected erroneously, it will not be cause of reversal. *Same.*

115. The legal restriction of taxation of costs to three witnesses to the same fact, does not preclude the party from examining others at his own cost. *Kash* v. *Miller & Richart*, 2 Bush, 568.

116. A paper referred to in an answer, but not filed so as to allow plaintiff an opportunity to inspect it before the trial, cannot be read without proof of execution. *Gentry* v. *Doolin*, 1 Bush, 1.

117. That services were rendered in 1864 instead of 1863 as alleged, was evidence sufficient to sustain verdict. *Same*, 1.

118. Where no law or emergency is shown to exist, which will authorize a district provost marshal to direct a county provost marshal to seize and take away private property, the letters of the district provost marshal directing the county provost marshal to do so are inadmissible for the defendant to justify the seizure. *Jones* v. *Commonwealth*, 1 Bush, 34.

119. On separate trial of one of nine defendants jointly indicted, his co-defendants are not competent for him unless pre-

viously discharged. (Criminal Code, sec. 232.) *Chandler* v. *Commonwealth*, 1 Bush, 41.

120. Notarial protest, under seal, of non-payment of a bill, is made evidence of dishonor. Proof of the habits and customs of the notary, bank officers, and clerks is competent evidence to show that legal notice was given to the drawer of the bill. *Trabue* v. *Sayre*, 1 Bush, 129.

121. On the issue whether a citizen is legally entitled to a vote, his statements made at the time of his departure from the State are competent. *Miller* v. *Rucker*, *&c.*, 1 Bush, 135.

122. Allegation of the value of wagons, etc., sold cannot be taken for confessed; and an allegation that all the work that plaintiff and defendant had agreed to do for third party had been finished, and that plaintiff's part of profits were so much, without alleging that defendant had collected them, not sufficient to maintain suit. *Gould*, *&c.* v. *Bond No.* 2, 1 Bush, 189.

123. It is no excuse for defendant that his statements were made as a witness, if they were knowingly false, and intended to cause the arrest and imprisonment of plaintiff; and oral statements of an officer when deciding to detain a prisoner, incompetent for defendant's defense. *Huggins* v. *Toler*, 1 Bush, 192.

124. Rejected depositions, to be considered by the court of appeals, must be made part of the record, by exceptions properly taken. *Walrath* v. *Viley*, 1 Bush, 266.

125. The letters U. S. on a horse, is *prima facie* evidence that the horse once belonged to the United States. The possession of the horse by the Confederate forces raises the presumption that it had been captured by them, and the Government of the U. S. can only acquire title to the horse again by capture or purchase. *Cessna* v. *Thurman*, 1 Bush, 292.

126. One who has conveyed land by deed with general warranty, not competent for vendee in action to recover the land. Otherwise now, chap. 37, sec. 22, Gen. Stat., 413. *Corbin*, *&c.* v. *Mulligan*, 1 Bush, 297.

127. In an action to set aside deed, evidence showing the character and progress of the decay of the faculties of the maker, after the execution of the deed, tend to show his true if not apparent condition at the time of acknowledgment. *Hendrix* v. *Money*, *&c.*, 1 Bush, 306.

128. U. S. being branded on a horse that has been traded privately for three years, is not sufficient of itself to show that the horse belongs to the United States. *Lewis* v. *King*, 1 Bush, 419.

129. A surveyor, from the marked lines, is supposed to have made two surveys, and abandoned one as inaccurate; the one preserved must be regarded as the true lines. *Slayden* v. *Boswell*, 1 Bush, 421.

130. The record in an ejectment can be used to show what was the issue between same parties, in a suit in equity for the same land. *Troutman, &c.* v. *Vernon, &c.*, 1 Bush, 482,

131. Plaintiff prosecuted action to recover land and damages, and action to recover damages for cutting timber, wood, &c., off of the same land. On the trial of the second action, plaintiff may show that the first action did not embrace the damages claimed in the second one. *Burr, &c.* v. *Woodrow, &c.*, 1 Bush, 602.

EXAMINING COURTS.

See CRIMINAL LAW AND PROCEEDINGS; and COUNTY JUDGE.

EXCEPTIONS.

1. That the party excepted to the ruling of the court at the time of the decision is sufficient—the words *object* and *except* mean the same thing; and is not necessary to except to the ruling of the court both before and after it is made. Long v. Hughes, 1 Duvall, 387, overruled on this point. *Poston* v. *Smith's ex'rs*, 8 Bush, 589.

2. Instructions offered by attorney for the Commonwealth must be excepted to by defendant, to be noticed by the Court of Appeals. *Edgerton* v. *Commonwealth*, 7 Bush, 142.

3. Excepting to filing amendment, after it has been filed without objection, is too late. *Helburn & Co.* v. *Mofford, &c.*, 7 Bush, 169.

4. Purchaser at a decretal sale may except to confirmation of commissioner's report, and may prosecute appeal to Court of Appeals to reverse decision against him. *Allen* v. *Graves, &c.*, 3 Bush, 491.

EXECUTION AND EXECUTION SALES.

1. Execution lien, when created, and how it relates back. *Carter, Fisher & Co., &c.* v. *Goodman, &c.*, 11 Bush (June 21, 1875).

2. See ASSIGNMENTS; BONDS; and LANDLORD AND TENANT.

3. To secure the protection of the provisions of the statute (Civil Code, secs. 709, 710, 711), the officer must show that he has complied with all such provisions, strictly and in the order of time prescribed. *Rudy, &c.* v. *Johnson, &c.*, 11 Bush (Nov. 12, 1875).

4. The moment an officer, acting under an execution, seizes the property of one not a defendant to the writ, a cause of action arises against him, not only for the damages resulting from its seizure and detention, but for its value in case the claimant sees proper to treat the act of the officer as a conversion of the property seized—unless he has heretofore required, and shall in due time return to the proper office, a good bond of indemnity. *Rudy, &c.* v. *Johnson, &c.*, 11 Bush (Nov. 12, 1875).

5. Purchaser of encumbered property at execution sale acquires only a lien, subject to the prior encumbrance. (Rev. Stat., sec. 1, art. 15, chap. 36; Forrest v. Phillips, &c., 2 Met., 194; Covington Bridge Co. v. Walker, 2 Duvall, 150.) *Atkins* v. *Emison, &c.*, 10 Bush, 9.

6. Sale of land under execution does not deprive the owner of his title. *Ibid.*

7. If the owner fails to redeem, the purchaser of encumbered property at execution sale may enforce his lien, and should make all interested persons parties to the action. *Ibid.*

8. The original debt is extinguished by the lien for the purchase money—the property, and not the debtor, being then bound for it. *Ibid.*

9. Purchaser of encumbered property at execution sale is not estopped from assailing any encumbrance; and their removal inures to his benefit. *Ibid.*

10. The execution debtor will not be substituted to the rights of the holder of the prior lien by paying the debt it secures, but the lien is thereby discharged. *Ibid.*

11. The liability of an officer for failing to sell property taken under an execution, is the value of the property. *Royse* v. *Reynolds*, 10 Bush, 286.

12. A purchaser at execution sale, without notice of an unrecorded deed, will be protected in his title. *Low & Whitney* v. *Blinco, &c.*, 10 Bush, 331.

13. A purchaser with notice, will also be protected, in case the execution creditor acts in good faith and without notice. *Ibid.*

14. Notice to the purchaser after his purchase does not affect him. *Ibid.*

15. Notice to the execution creditor at any time before he purchases, affects his conscience, and he may be compelled to transfer the legal title to the holder of the unrecorded deed. *Ibid.*

16. The acts of 1785 and 1796, relating to purchasers without notice of an unrecorded deed, were re-enacted in the Revised Statutes and General Statutes. *Low & Whitney* v. *Blinco, &c.*, 10 Bush, 331.

17. On a joint judgment the execution must be joint. (Rev. Stat., chap. 36, sec. 3, art. 2, 1 Stanton, 473.) *Tanner* v. *Grant*, 10 Bush, 362.

18. An execution, on a joint judgment, against one only of the defendants was illegal, and gave the sheriff no authority to take a replevin bond; nor was the judgment merged by the bond. *Ibid.*

19. A sale of more land than is necessary to satisfy an execution is void. *Dawson, &c.* v. *Litsey*, 10 Bush, 408.

20. The sheriff's return on execution can be impeached by extrinsic evidence only of the clearest character, if at all. *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

21. In the absence of other evidence conducing to sustain a charge of fraud, gross inadequacy of price, though ordinarily a badge of fraud, will not invalidate execution sales of land. *Craig, &c.* v. *Garnett's adm'r, &c.*, 9 Bush, 97.

22. Whisky in bond and under control of Federal officers, as security for the taxes thereon, is not subject to execution. But it is subject to execution as soon as it is released from the lien

and custody of the government, by the payment of the tax, etc. *May, &c.* v. *Hoaglan*, 9 Bush, 171.

23. Where an attachment has been levied on land, it is not liable to seizure and sale under execution issued pending the attachment suit, so as to defeat the attachment. *Husbands* v. *Jones, &c.*, 9 Bush, 218.

24. Execution may issue to county other than that of defendant's residence, or that in which the judgment was rendered, before a return of "no property found" of execution issued to the county of his residence. *Vance's adm'x* v. *Gray & Saffell*, 9 Bush, 956.

25. *Capias pro fine* may be replevied. *Commonwealth* v. *Merrigan*, 8 Bush, 131.

26. Time being extended for redeeming land sold under execution beyond one year by purchaser, by parol, creates a trust that the purchaser will hold the land as security for the money, and is entitled to ten per cent. on his money for the first year, and six per cent. per annum thereafter. *Williams* v. *Williams*, 8 Bush, 241.

27. One defendant, a surety in an execution, was released from liability to plaintiff by the latter ordering the return of the execution, after it had been levied on sufficient property of a co-surety who had agreed to pay the whole debt. *Martin* v. *Taylor*, 8 Bush, 384.

28. The terms *work-beast* and *work-horse* mean an animal of the horse kind which can be rendered fit for service, and by the statute a mare and colt are exempt from sale under execution. *Winfrey* v. *Zimmerman*, 8 Bush, 587.

29. A purchase of land at execution sale, by creditor for the benefit of the debtor, does not acquire the absolute title, but only a lien for his money. *Ferguson's adm'r* v. *Smith*, 7 Bush, 76.

30. Land sold under execution may afterwards be subjected and be resold for *pro rata* distribution among all the creditors of the owner, by proceedings under the act of March 10, 1856; and the purchaser should be released from his bond, and the levy and sale should be quashed. *Tucker, &c.* v. *Fogle*, 7 Bush, 290.

31. All proceedings and sales under a void judgment are void. *Roberts* v. *Stowers*, 7 Bush, 295.

32. To subject land to sale under a justice's judgment, sec. 846, Civil Code, must be complied with. *Austin* v. *Payne*, 7 Bush, 480.

33. To authorize a levy, the sheriff must have an execution in his hands in full force. *Savings Institution of Harrodsburg* v. *Chinn's adm'r*, 7 Bush, 539. And after levying the *fi. fa.*, he may take a replevin bond after the return day thereof from the defendant and his sureties. *Same*, 539.

34. "Sheriff will return this *fi. fa.*, and the clerk will immediately issue another execution, which the sheriff is directed to proceed to collect," signed by attorney for plaintiff. Clerk issued another *fi. fa.* instead of *venditio*. *Held*—that it did not release the surety on the replevin bond, no proof going to show that he sustained any damages thereby. The attorney had no authority to release the surety in the replevin bond, by indorsement on the execution. *Same*, 539.

35. Before selling land, the sheriff should have it valued by two disinterested intelligent housekeepers of the county, not related to either party; and if he permits each party to select one, it is a matter of courtesy. That they were sworn, may be shown by the officer's certificate or by his return. *Knight* v. *Whitman*, 6 Bush, 51.

36. Sales under execution, made by fraud, covin, or collusion, may be set aside by any person aggrieved, by motion or bill in equity. If on the ground of fraud in the selection or valuation of the appraisers, it must appear that the incorrect valuation was procured by fraud, or from mistake other than the mere judgment of the appraisers. *Lawrence, &c.* v. *Edelen*, 6. Bush, 55. The valuation, if fairly made, is the legal test of the defendant's right to redeem. *Same*, 55.

37. An unmarried *bona fide* housekeeper, with an unmarried sister and two brothers under 21 years of age living with him, whose parents are dead, and whose support and education he had assumed, is entitled to the exempted property mentioned in the act of the Legislature. *McMurray* v. *Shuck*, 6 Bush, 111. But it was not the intention that the exemption of provisions extended to operatives hired to labor for the debtor. *Same*, 111.

38. When land, encumbered by vendor's lien for unpaid purchase money, is levied on and sold under execution, the purchaser at such sale acquires a lien for the purchase money paid by him, and interest at ten per cent. per annum from day of sale until paid, subject to prior encumbrances. (Art. 14, chap. 38, Gen. Stat., 435.) The cases in 4 Bush, 662; 6 Bush, 115; and Same, 321; are no longer the law.

39. Stay of execution on replevin bond for more than a year, at the instance of the sureties on the bond, does not release them; nor does it vitiate the bond because signed on Sunday. *Prather* v. *Harlan and Thompson's adm'r*, 6 Bush, 185.

40. Land sold and conveyed by the heir, to a *bona fide* purchaser, for a valuable consideration, is not liable to a judgment against the vendor and his co-heirs, in an action brought after the alienation for the debt of their ancestor from whom the bond descended. *Anderson* v. *Summers*, 6 Bush, 423.

41. Exemption of property from execution only applies to a housekeeper with a family. *Seaton & Brodrick* v. *Marshall*, 6 Bush, 429. In this case, the horse of a physician was held to be exempt, who cooked and eat his meals in his office, and his two daughters were sometimes with him. *Same*, 429.

42. Plaintiff required mortgaged land to be levied on and sold as unencumbered property, and became the purchaser. The land was in equity subjected to the mortgagee's debt. The purchaser's right was subordinate to the mortgage, the same as if it had been sold as encumbered property; and the court properly refused to set aside the execution sale, and quash the sheriff's return. *Thomas* v. *McKay*, 5 Bush, 475.

43. Sale of land after death of the owner, under a levy of an execution in debtor's lifetime, void. *Burge's adm'r, &c.* v. *Brown, &c.*, 5 Bush, 555.

44. But the purchaser has a prior lien for the amount of his purchase price over the other creditors. *Same*, 535. Death of either party to an execution abates it; the judgment may be revived by rule, under amendment to sec. 437, Civil Code, of Jan. 19, 1866, or by ordinary proceedings. *Same*, 535.

45. Sheriff is responsible, whether defendants had property sufficient to pay the whole execution or not, if he had property sufficient to pay part of it; and if there are more defend-

ants in the executions first delivered, than in the last ones, the sheriff should make all the debts by collecting from the defendants who are not in some of the executions; and he is not responsible, if he returns the execution in obedience to the orders of the plaintiff or his attorney, but he must prove his defense. He ought, when he levies an execution, to state the facts and sign it; but if he does not, proof *aliunde* is admissible, that he levied it, and left it with the defendant, who afterwards removed, and disposed of it in such way as to deprive plaintiff of his debt. *Commonwealth for Tiffany* v. *Hurt*, 4 Bush, 64.

46. Land sold by fraudulent executory contract, but conveyed after the levy of an execution on it against the vendor, was subject to sale under the execution. *Daniel* v. *McHenry*, 4 Bush, 277. Possession of land acquired after the levy of an execution, is not adverse to the purchaser under it, and the sale not champertous. *Same*, 277.

47. A sale of more land than was authorized by the execution is not void, but voidable at the owner's option. In an action by the purchaser against the fraudulent vendee of the defendant in the execution, he cannot avail himself of the defect of title arising from such excess. *Same*, 277.

48. Inadequacy of price cannot be complained of, either by the execution defendant or his fraudulent vendee, when such inadequacy resulted chiefly from their own misconduct. *Same*, 277.

49. The act regulating sales of partnership property taken in execution for the separate debt of one of the partners, does not embrace sales of the interest of a joint tenant of lands. *Brown, &c.* v. *Burdett, &c.*, 4 Bush, 401.

50. When a sale of personal property, upon which an execution has been levied, has been suspended by persons not defendants in the execution, as provided for by sec. 713, Civil Code, any equitable cause may be shown against judgment on the bond, in whole or part. *Williams* v. *Smith*, 4 Bush, 540. Nothing but the interest of the partner, before settlement of the partnership, is liable to sale under execution against him. *Same*, 540.

51. The failure of the clerk to indorse on the execution credits shown by the judgment will render the sale of defendant's land thereunder void. In such case, when the execution and sale are quashed, the plaintiff may take out another execution. *Davie* v. *Long's adm'x*, 4 Bush, 574.

52. Horse was sold for $46 05, under execution for not half that much; *held*, that the officer transcended his authority. *Carrington* v. *Herrin, &c.*, 4 Bush, 624.

53. A bond of indemnity, taken by an officer *after* the sale, affords him no protection, if he were otherwise a trespasser. (Civil Code, secs. 709, 710, 711.) *Same*, 624.

54. Proof that a man with a family had absented himself from his home, when his only work-beast was taken under an execution, is not sufficient to deprive him of his right to claim it as exempted property. A mere temporary abandonment, or neglect or dereliction of duty, by the husband, will not deprive the wife and children of rights which it was intended should be secured to them. *Same*, 624.

55. If the sheriff sell more land than is necessary to satisfy the execution, it is void; and when the sale is set aside the commissions retained by him may be recovered in an action. *Shropshire, &c.* v. *Pullen*, 3 Bush, 512.

56. Secs. 709 and 711, Civil Code, apply to executions issued by the police judge of Owenton; and an action may be maintained on an indemnifying bond executed before the town marshal thereof, for the value of property sold which was exempt from execution. *Dixon* v. *Bacon, &c.*, 3 Bush, 534.

57. Levied on, &c., for satisfaction of within. Stayed by order of Jas. Roberts, attorney for plaintiff. This is a stay of the levy, and not of the execution, and was not discharged thereby. See act Dec. 20, 1865 (Myers' Sup., 755), requiring consent to stay, to be in writing, after Jan. 1, 1867. *Chamberlin & Tapp* v. *Brewer, &c.*, 3 Bush, 561. If the sheriff's return is ambiguous, it may be explained by other proof; and if unambiguous, it may be contradicted in a suit against the sheriff and his sureties. *Same*, 561.

58. The undertaking to pay any claimant, &c., in an indemnifying bond, embraces all claimants, legal and equitable. (Secs. 709, 711, Civil Code.) *Watts* v. *Cook, &c.*, 2 Bush, 141.

59. If an execution issues fifteen years after another has issued on the judgment, it should be quashed. The act of May 31, 1865, is constitutional. *Lockhart* v. *Yeiser & Co.*, 2 Bush, 231.

60. Failing to perfect a levy by a sale of property, for three years, must be regarded as an abandonment of the levy, so far as third parties are concerned. *Deposit Bank of Cynthiana* v. *Berry's adm'r*, 2 Bush, 236.

61. Sale of land by sheriff after death of execution defendant is void, but the death of defendant does not discharge lien of execution levied before his death; and such lien has priority of claim. *Holeman's ex'r* v. *Holeman's heirs, &c.*, 2 Bush, 514.

62. Replevin bonds signed and delivered, without date, to the sheriff, are valid; and he should date them at the day of delivery. Should he date them before the day of delivery, executions cannot properly issue on them until they are due, counting from the day of delivery. If issued before the proper maturity, sales made under them are void, if the purchasers are the plaintiffs in the executions. *Bettis, &c.* v. *Bailey, &c.*, 2 Bush, 608.

63. If property is exempt from sale under execution, and the owner sells it and retains possession, and it is then levied on and sold, the vendee may recover against the plaintiff who has it levied on and sold; and the protection of exemption applies to the property of a *bona fide* housekeeper, although it is *in transitu*, he having avowed his intention to leave the State. *Anthony & Co.* v. *Wade*, 1 Bush, 110.

64. Obligors in a replevin bond induced the bank to discount a note, and apply proceeds to satisfaction of a *fi. fa.*, which issued on the bond. The note was a forged one. Court properly set aside satisfaction of the execution, and awarded another on the replevin bond. *Offutt* v. *Bank of Ky.*, 1 Bush, 166.

65. A levy on personal property puts the officer in actual or constructive possession of it. Not so with land. Death of defendant, after levy on land, abates the execution, and a sale thereunder passes nothing. *Huston* v. *Duncan*, 1 Bush, 205.

66. After acknowledgment of the mortgage, but before lodged for record, an execution was levied on the same interest embraced by the mortgage. The lien of the mortgagees

was prior to that of the purchaser under the execution. *Righter, &c.* v. *Forrester, &c.*, 1 Bush, 278.

67. Ward's administrators filed a petition in equity, on a return of no property, asking for a discovery. Summons served June 6, 1865, and Shropshire answered July 13, 1865, disclosing an available interest in fifty acres of land. Robinson, on June 30, 1865, filed his petition in equity on a return of no property, charging that Shropshire held a vendible interest in the identical land. *Held*—that Robinson had priority. Ward's bill created no lien until the answer of Shropshire was filed. *Ward's adm'r* v. *Robinson, &c.*, 1 Bush, 295.

68. Purchaser of encumbered land, under execution, having paid for it in depreciated currency, is bound to receive back the same kind of currency when the land is redeemed, or its equivalent at the date of payment, with ten per cent. per annum from date of payment till refunded. *Sandford* v. *Farmers' Bank, &c.*, 1 Bush, 335.

69. An execution upon a replevin bond was returned satisfied, in 1861, by sale of land. Under the act of 1856, the land was taken and sold to pay all of the debts of the execution debtor. The sale under execution was set aside, and a *fi. fa.* issued on the replevin bond. Sureties on the bond enjoined it, on the ground of lapse of time. The injunction was made perpetual, and the setting aside of the sale affirmed. *Newman, &c.* v. *Hazelrigg*, 1 Bush, 412.

70. If a sheriff, by reason of willfulness, ignorance or want of proper care, levy on property having an extra value, on account of some peculiarly valuable quality, as blood in horses or cows, make an excessive levy, he will be responsible; he is bound to take as good care of stock levied on as an ordinarily prudent man would take of his own, and if he fails, he is responsible. *Vance* v. *Vanarsdale*, 1 Bush, 504.

EXECUTORS AND ADMINISTRATORS.

1. See CONSIDERATION. *Peters, &c.* v. *Bourne, &c.*, 11 Bush (March 22, 1875).

2. Sec. 26, General Statutes, p. 507, and sec. 20, of same chapter—as had similar enactments in the Revised Statutes—

changed the common law rule as to what constituted assets in the hands of an administrator; but neither of these sections makes the surety of an administrator liable for moneys, choses in action or rents, that did not belong to the intestate. *Wilson, guardian, &c.* v. *Unselt's adm'r, &c.*, 11 Bush (Nov. 13, 1875).

3. Rents accruing after an intestate's death belong to the infants or heirs to whom the real estate descended. They constitute no part of the intestate's estate in the hands of the administrator or which he had a right to receive, are improperly collected by him as administrator, and, although he is personally liable, the surety on his bond is not liable therefor. (Smith v. Bland, 7 B. Monroe, 21; 3 Kent's Com., 580.) *Wilson, guardian, &c.* v. *Unselt's adm'r, &c.*, 11 Bush (Nov. 13, 1875).

4. The former law is unchanged, in that all persons are incompetent to testify against an administrator, as to facts occurring before the death of the decedent, who were incompetent prior to the enactment of this law. *Manion's adm'r* v. *Lambert's adm'x*, 10 Bush, 295.

5. On a covenant with the administrator, by which certain repairs on the land were to be made, in part payment of rent, he may recover the cost of making the repairs; but he cannot recover for depreciation in rental value of the land after the term expires. *Manion's adm'r* v. *Lambert's adm'x*, 10 Bush, 295.

6. Where a defendant dies pending an action, and no personal representative qualifies, the action may be revived against the heirs alone; but the remedy is exclusively in equity. *Hagan, &c.* v. *Patterson*, 10 Bush, 441.

7. The word "party" in sec. 25, chap. 37, General Statutes, is the equivalent of the word "person" in sec. 22 of the same chapter. *Manion's adm'r* v. *Lambert's adm'x*, 10 Bush, 295.

8. The distributee of an estate is not a competent witness for the administrator of his intestate, in an action in the name of the administrator against the administrator of another deceased person. *Ibid.*

9. The county court has no jurisdiction, on motion of the nominated executor, to make allowances to him for compensa-

tion for his services, and for attorney's fees incurred by him in his unsuccessful effort to probate the will. He must present his claims in a settlement of his accounts as fiduciary, or resort to a court of equity. *Gilbert* v. *Bartlett*, 9 Bush, 49.

10. Costs incurred by an unsuccessful effort to probate a will should be taxed by the county court, and paid out of the estate of the deceased. *Ibid.*

11. An executor named in an unprobated will, is executor until that paper is pronounced invalid by the judgment of the county court. *Ibid.*

12. An executor nominated in the will has the right, before the will is admitted to record, to create accounts for funeral expenses and for the preservation of the estate; and he derives this power alone from being nominated in the will as executor. *Ibid.*

13. Though the will be adjudged invalid, and his qualifying as executor be thus defeated, he is entitled to a settlement of his accounts in the same manner as other fiduciaries, before being compelled to deliver up the estate. *Ibid.*

14. Interest, on money held and used by the executor for his own purposes during a protracted litigation, was properly charged against him, although there was no order of court directing him to loan out the fund. *Grigsby's ex'r* v. *Wilkinson, &c.*, 9 Bush, 91.

15. Refunding bonds cannot be required of devisees by an executor, after suits against him by creditors have been barred by lapse of time. *Ibid.*

16. One-half of the costs in this case was properly charged against the executor individually, as a considerable portion of the litigation grew out of his attempt to escape the advancement charged against him by the testator. *Ibid.*

17. The fund accumulated from the hire of emancipated slaves constituted no part of the assets of the estate of the testator, and the surety on the bond of the executor, not having covenanted for a faithful performance of his duties as trustee, was not responsible for his default in that regard. *Neely, &c.* v. *Merritt, &c.*, 9 Bush, 346.

18. Compensation to executors and trustees, being fixed in the will and paid to the first executor and trustee, a subsequent

executor and trustee is entitled to an allowance upon the profits of a large and well managed trust. *Young and wife* v. *Smith, &c.*, 9 Bush, 421.

19. Administration on the estate of a non-resident shall be granted in the county where he died, or where his estate (meaning real estate) or the greater part thereof lies, or where there may be debts or demands owing to him. *Hyatt* v. *James' adm'r*, 8 Bush, 9. Jurisdiction will not be defeated by the fact that his debtors had claims against his estate; and where the intestate owns land in several counties, the court will presume, in the absence of allegation or proof to the contrary, in favor of the action of the court in which the grant was made. *Same*, 9.

20. Rents of land accruing after the death of the intestate, are not assets in the hands of the administrator. *Rank* v. *Hill's adm'r*, 8 Bush, 66.

21. A *devastavit* may be shown without a return of *nulla bona*. *Emmerson's adm'r* v. *Herriford*, 8 Bush, 229. Property obtained fraudulently by the administrator from intestate in his lifetime, is subject to his debts, and are assets in the administrator's hands. *Same*, 229.

22. An estate held by a deceased person for the life of another, passes to the administrator of decedent, and is assets in his hands. (Sec. 26, art. 2, chap. 29, Gen. Stat., 450.) *Fox* v. *Long*, 8 Bush, 551.

23. An administrator is not compelled to plead the statute of limitations, and may pay a debt although barred thereby. *Payne and wife* v. *Pusey*, 8 Bush, 564.

24. An heir or devisee may require the administrator to plead the statute; but if the administrator has a debt against the estate which is barred by the statute, and in the settlement there appears a sufficiency to pay all the intestate's debts, the heir cannot prevent the administrator from retaining his own debt. *Same*, 564. The administrator will not be permitted to say he has paid his own debt, and require the other creditors to proceed against the heir; and if the administrator or other creditor proceeds against the heir, he may plead the statute or any other defense that the intestate might have done. *Same*, 564.

25. The surviving executor, or administrator with the will annexed, may exercise the powers conferred on the executor or

executors, notwithstanding a special trust was reposed by the testator in the persons named in the will. *Shields, &c.* v. *Smith, &c.*, 8 Bush, 601. If the lands of the testator were sold by the administrator as agent of the widow and heirs, and not as administrator, the proceeds of the sale are not assets in the hands of the administrator for which his sureties are responsible. *Same*, 601. (Sec. 9 art. 1, chap. 39, Gen. Stat., 442.)

26. But one debt was claimed against the estate, and that by the personal representative; he was not allowed an attorney's fee against the estate. *Wood* v. *Goff's curator*, 7 Bush, 59.

27. An administrator with the will annexed can sell and convey, even where a discretionary power is conferred on the executor to sell or not, if he declines to qualify. *Gulley* v. *Prather's adm'r*, 7 Bush, 167.

28. Burgess authorized his administrators to oversee and take charge of his farm, until his son became twenty years of age. One of the executors qualified, and by the advice of his attorney moved on the land and cultivated it in good faith. In a settlement, the executor should be charged with what he ought to have made by such management as the testator required and expected, and be allowed the value of his services, living and acting as he did. *Burgess* v. *Green, ex'r*, 7 Bush, 263.

29. Distributees cannot sue jointly and recover a joint judgment against the administrator for their several shares. *Pelly* v. *Bowyer*, 7 Bush, 513.

30. The right of action for personalty vests in the personal representatives of the claimant. *Hull* v. *Deatly's adm'r*, 7 Bush, 687.

31. A judgment against the administrator is *prima facie* evidence against the heirs, in a proceeding against them to subject land descended to them. *Hopkins* v. *Stout*, 6 Bush, 375.

32. A purchaser of infant's real estate, sold under judgment of the court on petition of the guardian, paid proceeds to the administrator of infant's father: He was compelled to pay again, notwithstanding payment to the administrator. *Herndon* v. *Lancaster's adm'r*, 6 Bush, 483.

33. Sureties of sheriff are not liable for proceeds of land which come to his hands as administrator of an estate, where he has obtained a judgment to sell enough real estate of in-

testate to pay the debts, after exhausting the personal estate in his hands. *Heeter, &c.* v. *Jewell*, 6 Bush, 510. His sureties are only liable for the personalty which came to his hands as assets. *Same*, 510.

34. When the will fixes the compensation of the executor, and he qualifies, he is limited to the amount fixed by the will. *Brown's ex'r* v. *Brown's devisees*, 6 Bush, 648.

35. Affidavit and demand not necessary before filing petition, where defendant's testator sold lands for plaintiffs, and they have no knowledge of the fiducial transactions of the employee, and defendant holds the evidences thereof and declines to make a settlement. But after discovery, and before a coercive settlement, an affidavit of the amount paid by testator or non-payment of anything, should be required of plaintiffs. *Fox, &c.* v. *Apperson's ex'r*, 6 Bush, 653.

36. An action by a surety for money paid by him, is an action on an account, and should be proved by the affidavit of a witness and the affidavit of the administrator, as required by the Civil Code, sec. 473, and demand made of the administrator before suit was brought; and if brought without these preliminaries, the suit should be dismissed; the administrator may require, at any time before the trial, that the plaintiff show that he made the proper demand, with proof, before commencing his suit. *Nuttall's adm'r* v. *Brannin's ex'r*, 5 Bush, 11.

37. A widow, having funds of her deceased husband in her hands, is bound to account to his administrator for them, and cannot claim exoneration on account of her distributive interest. *Cook* v. *Burton's adm'r*, 5 Bush, 64.

38. Instead of delivering property in kind to the widow, the administrator agreed to sell it and pay her a stipulated sum. Being no fraud, the agreement was sanctioned. *Grider, &c.* v. *Rodes, &c.*, 5 Bush, 277.

39. When the will is inoperative, and real estate relapses and passes to heirs by descent, their right cannot be defeated by any act of the executors; and if the devisee has the right, within a specified time, to elect to take real estate or its proceeds, unless the devisee has elected the executors have no authority to sell

within the prescribed time. *Buckner's ex'rs* v. *Cromie's ex'rs*, 5 Bush, 603.

40. Power in will to sell land to pay debts and legacies is peremptory. Sales of land in Kentucky by executor, under a Virginia appointment, void. An administrator *de bonis non*, under the act of 1810, may exercise all the powers of an executor. Although all the obligees of a bond of an executor, appointed by the county court of a county in Kentucky, are residents of Virginia, the bond is not void. Virginia executor, without power to sell, has no power to lease, except as agent for the heirs and devisees, and his tenants cannot attorn to others except the legal reversioners. When a will directs sale of land to pay debts, &c., if necessary, purchaser not presumed to know condition of the estate. In this case, they were presumed to know its condition, and the sale to them set aside. *Rutherford's heirs* v. *Clark's heirs*, 4 Bush, 27.

41. A request in a will to the executors to convert land into money is mandatory, and is in equity a conversion, and the legatee took the money; and it passed to the husband of the legatee. *Green* v. *Johnson, &c.*, 4 Bush, 164.

42. An administrator fails to make a settlement, as required by law; in a suit against him by the heirs for settlement and distribution, he is not entitled to a judgment for costs against them. *Ransdell, &c.* v. *Threlkeld's adm'r*, 4 Bush, 347.

43. An injunction against the creditors of a decedent cannot be sued out more than three years after the administrator qualifies. (Civil Code, sec. 472.) *Offutt's ex'x* v. *Bradford, &c.*, 4 Bush, 413.

44. On the dissolution of an injunction, sued out by an executrix for her own benefit as devisee, the damages were properly rendered against her, personally. *Same*, 413.

45. In an action by a personal representative, a set-off, verified by affidavit, and proved, without proof of demand of payment, may be plead by defendant. *Millet & Co.* v. *Watkins' adm'r*, 4 Bush, 642.

46. A surviving executor, being invested with the title to land, and the right to sell and convey, may authorize an agent to sell for him. *Colston's heirs* v. *Chaudet, &c.*, 4 Bush, 666.

47. To avoid circuity and delay, where it appears that notes which belong to the intestate are not necessary for payment of debts, and more than five years have elapsed since the intestate's death, the administrator *de bonis non* will not be permitted to recover the notes, but they will be distributed without passing through his hands. *Bellamy's adm'r* v. *Bellamy*, 3 Bush, 109.

48. An administrator, returning a note on his inventory against himself, is held to have collected it; and his sureties will be liable therefor, where it appears that it could have been made out of his property. *Hickman* v. *Kamp's adm'r and heirs*, 3 Bush, 205.

49. On the marriage of an administratrix, her authority as such ceases. *Duhme & Co.* v. *Young, &c.*, 3 Bush, 343.

50. But the right of an executrix in the State of Missouri to defend a suit in this State, is not extinguished by her marriage; and the local law requiring a foreign administrator to give bond before suing in this State, does not apply to one who is sued here. *Moss* v. *Rowland, &c.*, 3 bush, 505.

51. An executor, being requested by the will to raise two minor legatees, using the interest on their legacies as far as it would go in doing so, is not chargeable with interest on the legacies until after he ceased to provide for them. *Boyd* v. *Gault*, 3 Bush, 644.

52. A contract to pay one a consideration to administer on an estate is enforceable. *Clark* v. *Constantine*, 3 Bush, 652.

53. An administratrix *de bonis non* may maintain an action in equity to coerce payment of a note and enforce a lien, although the note was taken in his individual name by the former administrator, in satisfaction of a debt due the estate. *Burrus, &c.* v. *Roulhac's adm'x*, 2 Bush, 39.

54. An administrator obtains a judgment to sell land for payment of intestate's debts, to which the widow is a party but fails to answer in the action. She is entitled to the value of her dower interest out of the proceeds of the land. *Merriwether* v. *Sebree, &c.*, 2 Bush, 232.

55. R. and E., slaves until emancipated by the constitutional amendment, claimed to be husband and wife. Not having been legally married according to act of 14th Feb., 1866, relating to the marriage of negroes, R. had no right to qualify as her admin-

istrator in preference to her brother. *Estill* v. *Rodgers*, 1 Bush, 62.

56. An action for procuring the unlawful arrest of the plaintiff may be revived after his death, and prosecuted by his personal representative. *Huggins* v. *Toler*, 1 Bush, 192.

57. A trustee or executor will not be allowed to create in himself an interest opposite to that of the party for whom he acts, nor to traffic in the estate for his own emolument. *Faucett* v. *Faucett, &c.*, 1 Bush, 511.

EXECUTOR *DE SON TORT.*

An executor *de son tort* is to be sued and is liable as other executors; and defenses to their individual claims can be used, as though they were rightful executors. In a suit on a note by executor *de son tort*, with personal security on it, the surety may set up that the executor took possession and converted to his own use property of decedent in his lifetime, and use it as a set-off. *Finnell* v. *Meaux*, 3 Bush, 449.

EXEMPTION.

1. See HOMESTEAD EXEMPTION; and EXECUTIONS.

2. A debtor may sell or mortgage his property, exempt from execution, to secure the payment of a debt, and convey absolute title. *Moxley* v. *Ragan, &c.*, 10 Bush, 156.

3. Waiver of benefits under exemption law is against public policy, and cannot be enforced. (10 Howard, N. Y., 283; 31 Barb., 170.) *Moxley* v. *Ragan, &c.*, 10 Bush, 156.

4. A debtor's right of action to recover property exempt from execution, on his death passes to his widow, for the benefit of herself and infant children. *Myers' adm'r* v. *Forsythe*, 10 Bush, 394.

5. Where the proceeds of exempted property, sold under attachment, are in court at the death of the debtor, they pass to the widow and children. The presence of the wife at the sale and not objecting, is no waiver of her right. *Ibid.*

6. Under the homestead exemption act of Feb. 10, 1866, if one-third of deceased debtor's land is of less value than $1,000, the widow is entitled to have allotted to her, as for her dower, so much of the land, including the homestead, as is of the value of $1,000. *Gasaway, &c.* v. *Woods. &c.*, 9 Bush, 72.

7. Homestead exemption, after the death of the husband, continues for the benefit of his widow and children, but shall be estimated in allotting dower. *Gasaway, &c.* v. *Woods, &c.*, 9 Bush, 72.

8. Pension money, received from the United States, is exempt from all legal or equitable process. *Eckert & Co.* v. *McKee, &c.*, 9 Bush, 355.

EXPATRIATION.

1. The "expatriation act," approved March 16, 1862, was unconstitutional and void. *Burkett* v. *McCarty*, 10 Bush, 758.

2. A citizen may expatriate himself, but no legislation can denationalize a citizen. *Burkett* v. *McCarty*, 10 Bush, 758.

3. Such compulsive excission is a heavy punishment, which cannot be inflicted without judicial conviction. *Burkett* v. *McCarty*, 10 Bush, 758.

EXPECTANCIES.

A husband and wife undertook to sell her real and personal estate as expectant devisee of her father, and covenanted to pay the grantee $1,500 liquidated damages, if they failed to make the title good. Vendee took possession, after death of testator, and the contract was acquiesced in, during the husband's life. Vendee sued for a specific execution, or if refused, for $1,500 damages. *Held*—1. The execution of the contract was refused; 2. The stipulation to pay $1,500 was the expression of a penalty; 3. The estate of the husband was liable for the amount he received, subject to credit for personal estate received or retained under the contract; 4. That during the time the sale was acquiesced in, up to the death of the husband, no interest or rent to be charged; 5. Limitation did not begin to run while the vendor lived. *Lowry* v. *Spear, &c.*, 7 Bush, 451.

EXTORTION.

See JAILER.

FACTORS.

1. A factor may buy and sell in his own name, as well as in the name of his principal; and he is intrusted with the management, control, and disposal of goods to be bought or sold, and has a special property in them. He may sue in his own name for the price of goods sold by him, and has a right in his own name to receive payment, and to discharge the debtors from their official transactions unless notice to the contrary is given by the principals. Broker is a mere negotiator between other parties, and does not ordinarily act in his own name, but in that of his principal. He is not intrusted with the custody of goods which he may sell, and is not authorized to buy them in his own name. If he sells in his own name, without authority to do so, the principal will have the same rights against the purchaser as if his name had been disclosed. Where goods are sold by sample, and the purchaser is informed at the time of sale that they were not in possession of the seller, but were in the East, to be thereafter shipped and delivered to the purchaser, the law will infer that he knew that they belonged to other parties, and that the seller was a mere broker. *Graham & Co.* v. *Duckwall, &c.*, 8 Bush, 12.

2. It is the resident agent or broker who is required to take out license under the act of March 2, 1860. *Same*, 12.

3. An unauthorized sale of tobacco consigned to a warehouse, was ratified by a failure of the owner to promptly dissent. *Clay, &c.* v. *Spratt & Co.*, 7 Bush, 334.

4. Deposit of consignor's funds in bank by factor, in his own name, without directions, makes the factor liable, in case of the insolvency of the bank. *Cartwell, &c.* v. *Allard*, 7 Bush, 482.

5. The acceptance of a draft from the factor by the consignor, which was protested and returned, without laches on his part, did not extinguish the liability of the factor. *Same*, 482.

FEES.

1. "The arrest to be made free of charge to the State of Kentucky," being written by the direction of the Governor across the face of the commission appointing the agent for the State, and the same being received by the agent upon such condition, was a waiver of his right to claim compensation under the act (1 Stan., 559) authorizing State agents to be appointed for certain purposes. *Booker* v. *Stevenson*, 8 Bush, 39.

2. No allowance can be made to a master commissioner properly, unless he presents a statement of the number of days he has been necessarily engaged in the business, sworn to before some officer, and sustained by other evidence, unless dispensed with, and unless the allowance is made by consent of the parties. The expression of opinion as to a proper allowance, by persons to whom it is referred, is not that character of evidence contemplated by the statute. *Underwood* v. *Dickinson*, 8 Bush, 337.

3. Jailers' fees cannot be attached. *Webb* v. *McCauley*, 4 Bush, 8.

4. Justice of the peace presiding at more than one examining court on the same day, is entitled to $2 per day for each case. *Johnson* v. *Auditor*, 4 Bush, 321.

5. Levy under *fi. fa.* and sale under *vend. ex.:* sheriff can only charge full commission for sale under the *vend. ex.*, and had no right to charge half commission for the levy of the *fi. fa.* suspended by plaintiff's order; and the subsequent quashal of the sale by plaintiff did not deprive the sheriff of his right to commission, the sale having been directed by him. *Boyd, &c.* v. *Harper*, 3 Bush, 142.

FELONY.

See CRIMINAL LAW AND PROCEEDINGS.

FENCES.

1. Chapter 50 of the Revised Statutes, and the act amendatory thereof (Myers' Sup., 272), are constitutional, regulating

the relative rights and responsibilities of the proprietors of inclosed land. *Wills* v. *Walters*, 5 Bush, 351.

2. Defendant chased plaintiff's mare with dogs, within a field under his control, not inclosed by a lawful fence: Error for the court to say to the jury that defendant was not liable, if he only did what other prudent persons might have done. The act *supra* applies to any one who controls the premises, whether he was or not the owner. *Jones* v. *Hood*, 4 Bush, 80.

FERRIES.

1. The establishment of a ferry across the Ohio river from Covington, Ky., to Cincinnati, did not vest in the owners of the franchise the exclusive privilege of transporting persons or property across the Ohio river for hire, by whatever mode the Legislature might choose to authorize, in view of the convenience of the public, the increase of travel, etc. *Piatt, &c.* v. *Covington and Cincinnati Bridge Co.*, 8 Bush, 31.

2. The laws of Kentucky do not grant or secure or protect the right of ferrying across the Ohio river, except from the Kentucky to the opposite shore, and a Kentucky ferryman is not liable to the penalty in act of March 4, 1865 (Myers' Sup., 236), for refusing to transport persons or things from that to this shore. *Reeves* v. *Little*, 7 Bush, 469.

3. The trustees of Paducah were authorized to lease the ferry across the Ohio river at that point at public outcry, but leased it privately. Its validity could not be questioned by a stranger, who attempted to run an unlicensed ferry within one mile of it. *Owens* v. *Roberts*, 6 Bush, 608.

4. A ferry having been established from the south to the north bank of the Kentucky river in 1813, and the privilege of landing on the north bank been used under a claim of right for more than 50 years, a grant will be presumed; and the ferry having been re-established since from the south bank to public highway on the north side, no writ of *ad quod damnum* was necessary to condemn the land on the north bank; and the court should refuse the establishment of another ferry, as the public necessity did not require it. *Clark, &c.* v. *White, &c.*, 5 Bush, 353.

5. To entitle a person to establish a ferry across Cumberland river, he must own the land on one side of the river. An appeal may be prosecuted in ferry cases to the circuit court, without *supersedeas*. (Civil Code, secs. 20, 22, &c.) *Ballow* v. *Pettus, &c.*, 3 Bush, 608.

FIDUCIARIES.

1. But one commission will be allowed a fiduciary acting in different capacities, for performing a single duty which involves no additional labor. *Clark and wife* v. *Anderson*, 10 Bush, 99.

2. Guardians and administrators are not officers of the county court, but trustees; and they cannot be removed without just cause. (Isaacs v. Taylor, 3 Dana, 600; Murray v. Oliver, 3 B. Mon., 1.) *Dunlap* v. *Kennedy*, 10 Bush, 539.

3. Fiduciary demands only have priority against estates of dead persons. *Hemphill, &c.* v. *Lewis*, 7 Bush, 214; *Salter* v. *Salter, &c.*, 6 Bush, 624.

FINAL ORDER.

1. An order confirming a report of sale is final, and may be appealed from. *Dawson, &c.* v. *Litsey*, 10 Bush, 408.

2. An order compelling a plaintiff to elect which of two causes he will prosecute is not a final order, but it may be revised on appeal from the final judgment. *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

FINAL TRIAL.

A trial resulting in a verdict is a final trial. In this case, judgment in favor of the defendant was reversed by the court of appeals, and the case remanded for a new trial. The defendant filed a petition for the removal of the action to the United States circuit court, alleging that he was a citizen of another State. *Held*—that the application was not made "before final trial or hearing," within the meaning of the act of Congress of March 2, 1867. *Hall & Long* v. *Ricketts*, 9 Bush, 366.

FINES.

1. See REPLEVIN BONDS.

2. Would a remission by the Governor of a fine, defeat the claim of one "entered as a prosecutor," under chapter 42, Revised Statutes (2 Stanton, 565)? Stated, but not decided. *Harris* v. *Beavan, &c.*, 11 Bush (June 28, 1875).

3. A fine of $1,500 for an outrageous battery on a defenceless woman not excessive. *Chandler* v. *Commonwealth*, 1 Bush, 41.

FIXTURES.

1. Tenant must, before lease expires, remove all such fixtures as he put on the premises for his own convenience. *Thomas* v. *Crout*, 5 Bush, 37.

2. It appearing by parol evidence that the tenant was to have the privilege of removing buildings put on the premises for his own convenience, he should not be prevented from removing them by the interposition of the chancellor. *Gray* v. *Oyler*, 2 Bush, 256.

FORBEARANCE.

The agreement of the obligee with the principal obligor to forbear for a specified time, upon a consideration of six per cent. or usurious interest, will release the sureties if made without their consent. *Robinson, &c.* v. *Miller*, 2 Bush, 179.

FORCIBLE ENTRY AND DETAINER.

1. On the trial of a traverse, the circuit court should quash the warrant, if the relation of landlord and tenant does not appear on the face of the warrant—where the proceedings is for a forcible detainer. (1 Duvall, 151.) *Taylor, &c.* v. *Monohan*, 8 Bush, 238.

2. If the traverse to an inquisition on a warrant of forcible entry before a justice is not filed within three days, and bond for

an appeal executed, it cannot be filed in the circuit court *nunc pro tunc*. *Burchett* v. *Blackburn*, 4 Bush, 553. The recitals in the bond might be presumptive evidence that the traverse had been filed, in the absence of any opposing fact or testimony. *Same*, 553.

3. Sec. 501, Civil Code, provides that it shall not be material whether the tenant received the possession of the demised premises from his landlord, or became his tenant after receiving the possession. *McMurtry* v. *Adams*, 3 Bush, 70.

4. A mere continuance in possession, without a refusal to surrender it, is not sufficient to convict a tenant of forcible detainer. *Shepherd* v. *Thompson*, 2 Bush, 176. An acquittal will not bar a subsequent action for a forcible detainer, committed at a subsequent date. *Same*, 176.

FOREIGN JUDGMENTS.

1. Though the courts of this State have no revisory power over the judgments of foreign courts, when a complainant seeks relief upon a foreign judgment, and himself shows that the court rendering it had usurped jurisdiction, they have the right to refuse to enforce its payment, or even to regard it as *prima facie* evidence of the existence of a legal obligation on the part of the person sued. *Kerr, Brown & Co.* v. *Condy*, 9 Bush, 372.

2. The court will not presume the existence of a debt or legal obligation by reason of a foreign judgment—where the person sought to be charged has not been offered an opportunity to make defense—unless every fact necessary to authorize the foreign court, under the laws of the place, to render such judgment is made to appear affirmatively. *Ibid.*

3. A judgment of a court of a foreign country will be generally treated as void, if the defendant has neither defended nor been afforded an opportunity to make defense. *Ibid.*

FOREIGN RECORDS.

1. The verity of judicial proceedings of courts not of record may be established by an exemplification of a copy under the

State seal, or by a copy proved to be true by a witness who has compared it with the original (1 Greenleaf's Ev., 649), or by testimony as other facts are proved. The jurisdiction may be shown by the statute, or by the testimony of those learned in the law of the place. (17 Mass., 543; 1 Greenleaf's Ev., 627.) *McElfatrick* v. *Taft & Son*, 10 Bush, 160.

2. A judgment *in personam*, rendered in another State by a court not of record, is to be received in this State as *prima facie* evidence of the indebtedness. *McElfatrick* v. *Taft & Son*, 10 Bush, 160.

3. The plea of *nul tiel record* is not good in an action, in this State, on the judgment of a justice of the peace of another State. *McElfatrick* v. *Taft & Son*, 10 Bush, 160.

4. The plea of *nil debet* is no defense to such action under our Code. *McElfatrick* v. *Taft & Son*, 10 Bush, 160.

5. The act of Congress prescribing the mode of authenticating records, and the credence to be given them, does not relate to courts not of record in the States where they are organized. *McElfatrick* v. *Taft & Son*, 10 Bush, 160.

FORFEITURES.

1. In a contract, a forfeiture agreed upon as liquidated damages should be enforced; unless it be so exorbitant that to enforce its payment would be to inflict a penalty on the party in default, instead of merely making good the injury sustained by reason of the breach. *Elizabethtown & Paducah R. R. Co.* v. *Geoghegan*, 9 Bush, 56.

2. Forfeitures are regarded by courts with little favor, and will seldom be upheld, if intended to operate as penalties. But there are cases in which parties will be allowed to agree upon a definite sum, as the amount of damages which may result from the violation of their contract. *Elizabethtown & Paducah R. R. Co.* v. *Geoghegan*, 9 Bush, 56.

3. The waiver of a forfeiture may be inferred from the failure of the party entitled to the estate to re-enter or assert some claim, in a reasonable time after the termination of the estate; and particularly where the grantee is permitted to use and make

valuable improvements on the premises after the condition is broken. *Kenner, &c.* v. *American Contract Co.*, 9 Bush, 202.

4. The right to hold office and to vote, can be forfeited only by the judgment of a court on indictment. *Burkett* v. *McCarty*, 10 Bush, 758.

FORGERIES.

See EXECUTIONS.

FORMER ACQUITTAL.

By the same act and with the same intent, F. took a horse, wagon, and harness, the property of H. Two indictments were found. On the trial for stealing the horse, F. plead not guilty, and was acquitted. This judgment was a good plea in bar against the indictment for stealing the wagon and harness. *Fisher* v. *Commonwealth*, 1 Bush, 211.

FORMER ADJUDICATION.

1. A judgment of a court of concurrent jurisdiction directly upon the point is, as a plea in bar or as evidence, conclusive between the same parties and upon the same matter directly in question in another court. *Crabb* v. *Larkin, &c.*, 9 Bush, 154.

2. A judgment of court and record in a suit on promissory notes against one party, cannot be read by the plaintiff as evidence in another action on the same notes, against another defendant who was not a party to the first suit. *Ibid.*

FORTHCOMING BOND.

1. See BONDS—STATUTORY, &C.

2. Obligors in a forthcoming bond, to have the property forthcoming "to abide the further orders of the court," are held to have been bailees of the property named in the bond. *Bush, &c.* v. *Groom*, 9 Bush, 675.

FRAUD.

1. See WILLS.

2. A sale of land by a commissioner of court—where by-bidding is suspected, but diligent inquiry fails to ascertain the competing bidder—will not be set aside as fraudulent, if, under these circumstances, the successful bidders execute their notes for the purchase money; more especially, where the purchasers are afterwards unwilling to cancel and abandon the purchase, but hold on to the land and move the court to reduce the bid from $100 to $80 per acre. *M. P. Robinson, &c.* v. *B. F. Robinson's trustee, &c.*, 11 Bush (April 20, 1875).

3. A fraud may be perpetrated as well by assertion of facts that do not exist, ignorantly made by one who might be supposed to have informed himself, as by concealing facts known to exist. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

4. Where one purchases a chattel, and obtains possession by fraud, and then sells to an innocent purchaser, the title vests in the latter. *Vaughn, &c.* v. *Hopson*, 10 Bush, 337.

5. A chancellor must have the same evidence of fraud as would satisfy a jury. *Marksbury, &c.* v. *Taylor, &c.*, 10 Bush, 519.

6. In the absence of other evidence conducing to sustain a charge of fraud, gross inadequacy of price, though ordinarily a badge of fraud, will not invalidate execution sales of land. *Craig, &c*, v. *Garnett's adm'r, &c.*, 9 Bush, 97.

7. Money coerced by a judgment obtained by fraud may be recovered back (although it has been replevied) in equity, without awarding a new trial of the common law action, or setting aside the judgment therein. Where the defendant is lulled into a false security by some act of the plaintiff, and he thereby obtains a judgment, to the prejudice of the defendant, the judgment thus obtained is fraudulent, and may be set aside on that ground. (11 B. Mon., 214.) *Ellis* v. *Kelly*, 8 Bush, 621.

8. Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor *femes covert* are privileged to practice frauds upon innocent persons. (8 B. Mon., 543; 14 B. Mon., 513.) *Schmitheimer and wife* v. *Eiseman*. 7 Bush, 298.

9. The *onus* is upon the defendants to establish the fraud or oppression alleged by them. *Thompson, &c.* v. *Wharton*, 7 Bush, 563.

10. Where the vendor knew that his affirmation that the stock of goods amounted to $3,500, when in fact to only $2,000, he was guilty of a positive fraud; and if he believed it to be true, it might be constructively fraudulent. Unless he knew it to be true, good faith required him to express it as a mere opinion; but a positive affirmation, if untrue, was reckless and deceptive. *Morehead* v. *Eades*, 3 Bush, 121.

11. An assurance, by an auctioneer to bidders, that "he knew Wilson well," and "he was all right," and "he would warrant the title to be good," amounts to a warranty. The buggy had been stolen. Such assurances by the auctioneer were constructively, if not actually, fraudulent. *Dent* v. *McGrath*, 3 Bush, 174.

12. False affirmations, tinged with actual fraud, *malo animo*, are actionable without written evidence, being excepted from the statutes. *Same*, 174.

13. Voluntary gifts are void as to pre-existing creditors. *Miller* v. *Desha and wife*, 3 Bush, 212; *Lowry* v. *Fisher, &c.*, 2 Bush, 70.

14. Notes, mortgages, and deeds, procured to be executed by a man nearly 80 years of age, without any adequate consideration, and who, from his mental and physical condition, was incapable of protecting himself, *held* to be invalid. *Coleman, &c.* v. *Frazer, &c.*, 3 Bush, 300.

15. While an auctioneer is selling goods of one man, another person procures him to sell his goods, without informing him whose they are. This is a fraud on the auctioneer and bidders; and, upon discovery of the fraud, the vendee may repudiate the sale. *Thomas v. Kerr*, 3 Bush, 619.

16. Where a man and wife sell a slave absolutely, and she has only a life-estate therein: the slave afterwards being freed by amendment to the Constitution, purchaser is entitled to restitution *pro tanto*, to the extent of the title he paid for more than he got. *Cook* v. *Redman*, 2 Bush, 52.

17. Vendor retaining possession of personal property, *per se* fraudulent; and that vendee resides with vendor does not alter the rule of law. (4 Mon., 584; 8 B. Mon., 11.) *Steir* v. *Robin-*

son & Co., 2 Bush, 307. Where the stock of goods was replenished from time to time by vendee, who paid the rent of the house, will be evidence that he is the owner. *Same*, 307.

18. Receipts for land, shown to be for the land in contest, and admitted by administrator in his answer, constitute a sufficient written memorial of the sale. *Miller's heirs* v. *Antle*, 2 Bush, 407.

19. A lease made by a man over 90 years of age, acquiesced in for a number of years before his death by his children, and after his death by them as administrators of his estate, will not be disturbed on account of inadequacy of consideration, or of the imbecile condition of the old man when the lease was made. *Waters* v. *Barral's heirs*, 2 Bush, 598.

20. Property exempt from sale under execution, the vendee may recover the value of it against a creditor of the vendor, who has levied upon and sold it. *Anthony & Co.* v. *Wade*, 1 Bush, 110.

21. Money advanced upon a fraudulent consideration, or want of it, may be recovered back. *Woodward* v. *Fels*, 1 Bush, 162.

22. Beer sold by O. to M., on the credit of L., &c., with their direction to charge it to them, which O. did: statute of frauds does not apply. *Leisman, &c.* v. *Otto*, 1 Bush, 225.

23. It is fraudulent for a commissioner to become a partner of the purchaser of property sold by him; and the sale will be set aside. *Chatham* v. *Pointer, Fisher & Co.*, 1 Bush, 423.

FRAUDULENT CONVEYANCES.

1. A fraudulent grantee, who has not only contributed to the fraud, but has been the principal instrument for its accomplishment, cannot be favored in a court of equity. *Kueven, &c.* v. *Specker, &c.*, 11 Bush (March 4, 1875).

2. The property realized by setting aside a conveyance as fraudulent, must be distributed strictly according to the statute, and fiduciary debts have preference. Persons under disability may by subsequent suit assert their rights, where they are disregarded by such distribution. *Roberts and wife* v. *Phillips, &c.*, 11 Bush (March 5, 1875).

3. None but creditors can set aside conveyances, because voluntary, in the absence of fraud. *Jones and wife* v. *Hill*, 9 Bush, 692.

4. A conveyance will not be set aside at the suit of the vendor's creditors as fraudulent, unless it appears that the vendee had notice of the fraudulent intent. *Beadles and wife* v. *Miller, Gardner & Co.*, 9 Bush, 405.

5. Dower of wife is not barred by a conveyance executed by husband and wife, but set aside as fraudulent. *Lockett's adm'r* v. *James, adm'r*, 8 Bush, 28. (1 Washburn on Real Property, 213.) *Dugan* v. *Massey*, 6 Bush, 81.

6. Bond for land provided that the land should not be liable for vendee's debts before a particular date, but subject to his after-created debts. The provision in the writing to screen it from prior debts is inconsistent with the grant, and void. *Carlin's adm'r* v. *Carlin*, 8 Bush, 141.

7. Ten days before the marriage, after the agreement had been entered into to marry, but without the knowledge of the intended wife, the man voluntarily conveyed land to his children. It was binding on him but not on her; and did not deprive her of her dower interest, and the grantees held it subject to her prospective interest. *Leach, &c.* v. *Duvall and wife*, 8 Bush, 201.

8. Property obtained fraudulently by an adminstrator, before the intestate's death, from him, is assets in the administrator's hands. *Emmerson's adm'r* v. *Herriford*, 8 Bush, 229.

9. Deed fraudulent in fact cannot stand for reimbursment, but may if only constructively fraudulent; and where the deed is actually fraudulent as to grantor, and only constructively so as to grantee, the property should be held liable to the consideration paid by grantor, and it has priority. *Wood* v. *Goff's curator*, 7 Bush, 59.

10. Dower of surviving wife is barred by a conveyance executed by husband and wife, which is adjudged to be within the act of 1856, (1 Stanton's Rev. Stat., 553). *Cantrill* v. *Risk*; 7 Bush, 158.

11. A fraudulent conveyance made to several grantees, with an assurance to the grantor that her rights should not be affected. One of them took the estate to manage for the grantor, and by

permitting her to dispose of the property, did not incur any responsibility to the other grantees. *Riddle, &c.* v. *Lewis*, 7 Bush, 193.

12. A conveyance of land—in consideration of $500 paid by the vendee, and his obligation to maintain the grantors during their lives—being set aside at the instance of creditors of the vendor, the vendee is entitled to restitution of the $500, and a prior lien therefor. *Dohoney, &c.* v. *Dohoney*, 7 Bush, 217.

13. A merchant sold his son his stock of groceries, and the son from time to time replenished the stock. The sale held to be fraudulent. Creditors of the father have priority out of proceeds of original stock when the attachment issued, and for a personal judgment for the residue against the son. His creditors have a right to be paid out of the proceeds of goods he purchased and blended with the original stock. *Carter, &c.* v. *Carpenter, &c.*, 7 Bush, 257.

14. A conveyance by a husband to his wife's father in consideration of advancements theretofore made by the father to the daughter—*held* to be voluntary and fraudulent as to creditors of the husband. *Farmers' Bank of Ky., &c.* v. *Long, &c.*, 7 Bush, 337.

15. Discharge in bankruptcy does not prevent creditors from enforcing liens in the State courts, upon property fraudulently conveyed to other persons. *Payne & Bro.* v. *Able*, 7 Bush, 344.

16. Six thousand dollars were paid on a house and lot, with the wife's money, and two notes given for two thousand dollars each, in one and two years, by the husband. Not void as to subsequent creditors of the husband. The validity of a voluntary conveyance depends on the intention with which it is made. *Place* v. *Rhem, &c.*, 7 Bush, 585.

17. A vendor by executory contract cannot, after assigning the notes for the purchase money for the land to several persons, deprive either or any of the assignees of their lien on the land by conveying it to the vendee, pretermitting the notes or any of them, vendee having notice of the outstanding assigned notes. *Guy* v. *Butler*, 6 Bush, 508.

18. Conveyance of exempted homestead, even to prefer creditors, will not be deemed fraudulent. *Lishy, White & Cochran* v. *Perry, &c.*, 6 Bush, 515.

19. Fraud committed by a married woman may vitiate a sale made by her, and authorize a rescission of the contract; or it may estop her from avoiding a sale or conveyance of her property. But she is not liable for a fraud committed by her in the sale of her general property. *Curd* v. *Dodds*, 6 Bush, 683.

20. If there is no fraud against creditors, the party receiving a conveyance must hold it according to the original trust, or he must pay for the property conveyed. *Martin* v. *Martin, &c.*, 5 Bush, 47.

21. Three days after committing an assault, the defendant conveyed voluntarily to his wife his house and lot, with the design of defeating the successful prosecution of the suit for the assault. The deed held to be fraudulent, and set aside. *Slater* v. *Sherman*, 5 Bush, 206.

22. The rule that possession must accompany the sale of personal property, does not apply to the sale of a crop of tobacco then growing. *Morton* v. *Ragan & Dickey*, 5 Bush, 334. Nor is the sale of exempted property fraudulent because the vendor retains possession. *Same*, 334.

23. A plaintiff who files his petition under the act of March 10, 1856, cannot dismiss his petition so as to defeat the action of other creditors, who have filed their claims while the proceeding was pending; the case may be referred to the master to report all the essential facts. *Sawyers, &c.* v. *Langford, &c.*, 5 Bush, 539.

24. In 1864, a bond for two lots was given as collateral security, and in 1866 one of the lots was sold to the assignee of the bond in payment of the debt. If any preference was given, it was in 1864. *Mundy* v. *Mason, &c.*, 4 Bush, 339.

25. A person agrees by parol to purchase land at a decretal sale, and hold it until the purchase money is refunded with interest by the defendant for him. Purchaser obtained an absolute conveyance, and sold to a vendee with notice. The act of the vendee was fraudulent, and he and his vendor were compelled to execute the parol agreement. *Green* v. *Ball*, 4 Bush, 586. (14 B. Mon., 264; 16 B. Mon., 8; 2 Bush, 407; 9 Dana, 108.)

26. Innocent purchaser for a valuable consideration is not affected by fraud of prior parties. *Colsten's heirs* v. *Chaudet, &c.*, 4 Bush, 666.

27. Any act by an insolvent debtor, to give preference to any part of his creditors—by confessing judgment, or lending his aid to having judgment rendered against him—comes within the act of March 10, 1856, and amendment. (Myers' Sup., 239.) *Wilson* v. *Snelling, &c.*, 3 Bush, 322. See "Fraudulent Conveyances," in General Statutes.

28. A voluntary deed to a wife and child, with the fraudulent intent as to existing debts or with a design to future indebtedness, is void to prior and subsequent creditors; but subsequent creditors cannot, nor can prior creditors upon the mere ground that it is voluntary, impeach it. If the grantor was not indebted, at the time, to such an extent as to deprive his creditors of an ample fund to pay their debts, a good consideration, although voluntary, will be sufficient to uphold the conveyance. *Duhme & Co.* v. *Young, &c.*, 3 Bush, 343.

29. Where a deed is attacked as fraudulent, there should be other evidence than the mere recitals of the deed to establish a valuable consideration. *Whitaker* v. *Garnett, &c.*, 3 Bush, 402.

30. A conveyance to a man's children, when he is indebted to others to a material extent, will be invalid as to all creditors, whether pre-existing or future. In such a case, the fraudulent intent is implied. *Lowry* v. *Fisher, &c.*, 2 Bush, 70. Such a deed being set aside, although the wife has relinquished her potential right to dower, does not bar her of it. *Same*, 70.

31. To make a conveyance come within the act of March 10, 1856, the grantor must have been previously indebted, and intend by it to prefer his previous debt or debts, in contemplation of insolvency. *Oneil, &c.* v. *Miller, &c.*, 2 Bush, 289.

32. Where property is purchased by a debtor, in the name of a third person to whom the conveyance is taken, the case is not within the statute against fraudulent conveyances. *Marshall &c.* v. *Marshall, &c.*, 2 Bush, 415. And where lands are purchased with the funds acquired by the wife's skill, &c., and conveyed to her, her husband's creditors cannot touch it. *Same*, 415.

33. A conveyance of land made by the husband to the use of his wife, under circumstances which made it the voluntary discharge of an obligation which the chancellor would have compelled on proper application of the wife, was not fraudulent or void, nor in violation of the act of 1856 against fraudulent conveyances in contemplation of insolvency. *Latimer, &c.* v. *Glenn, &c.*, 2 Bush, 535.

34. A conveyance in fee of all the real and personal estate of the grantor, in consideration of the grantees assuming to pay certain specified debts of the grantor, *held* to be fraudulent, on the ground of inadequacy of price, non-delivery of possession, and other badges of fraud. *Foster, &c.* v. *Grigsby*, 1 Bush, 86.

35. A surety loaned to his principal a sum sufficient to pay the debt for which they were bound, and took a mortgage to secure its repayment. *Held*—not within the act of March 10, 1856. *Davis* v. *Gardner & Co.*, 1 Bush, 272.

FRAUDS, STATUTE OF.

1. See STATUTE OF FRAUDS AND PERJURIES.

2. An absolute deed was made, to extinguish an existing indebtedness; it was orally agreed that the vendor might redeem the land by paying the debt and interest, but vendor refused to have this agreement inserted in the writing. Vendor asked to have land sold, and excess over paying debt and interest paid to him. No evidence that the consideration in the deed was not a fair price for the land. There was no allegation or proof that the oral agreement was omitted by mistake; but the averments of fraud were restricted to the parol agreement and its violation. Petition dismissed properly. *Harper* v. *Harper*, 5 Bush, 176.

GAMING.

See BETTING AND GAMING.

GARNISHEE.

1. An estate subject to execution cannot be levied on and sold under an attachment, issued under the provisions of the act to authorize creditors in certain cases to garnishee before judgment and return of no property found. *Jenkins* v. *Jackson, Loving & Co.*, 8 Bush, 373.

2. Where parties alleged to be indebted to the execution defendant are made parties to the suit and summoned, and it is specifically alleged how much they are indebted severally to their co-defendant in the execution, judgment by default may be taken against those who are before the court, and continued as to the residue. *Joyce* v. *O'Toole, &c.*, 6 Bush, 31. (Civil Code, secs. 248, 474.) *Bowen* v. *Emmerson, &c.*, 4 Bush, 345.

3. Judgment by default, against a garnishee who is not a party to the suit and summoned, is erroneous. *Griswold* v. *Peckenpaugh*, 1 Bush, 220.

4. Judgment against a garnishee is equivalent to payment to his creditor, and if judgment is rendered before the debtor has notice of the assignment of his note, it will be a valid defense against the assignee, although his assignment was prior to the judgment. *Coburn, &c.* v. *Currens & Owens*, 1 Bush, 242.

GENERAL STATUTES.

The General Statutes contain all the statute law on the subjects indicated by the titles therein. *Broaddus' devisees* v. *Broaddus' heirs*, 10 Bush, 299.

GIFTS *CAUSA MORTIS*.

1. A writing signed by a man, purporting to give all of his personal property to three of his sons, *held* to be ineffectual, because there was no possession given of the writing or property by the donor, and acceptance by the donees. *Payne, &c.* v. *Powell, &c.*, 5 Bush, 248.

2. A trustee held the title and possession of a note which the husband gave to his wife; and it was held good, without any

delivery by the donor's own hands. *Southerland* v. *Southerland's adm'r*, 5 Bush, 591.

GRAND JURY.

1. See INDICTMENT.

2. Qualifications of grand jurors discussed. (Gen. Stat., 570.) *Commonwealth* v. *Pritchard*, 11 Bush (Sept. 13, 1875).

GROWING CROPS.

The mortgage of a growing crop of tobacco, by an insolvent debtor, when it was not subject to execution, did not operate as an assignment of all the mortgagor's property and effects under the act of March 10, 1856. *Brewer & Orr* v. *Cosby*, 8 Bush, 388.

GUARDIAN *AD LITEM.*

1. A guardian to defend for non-resident infant defendants must be appointed, and must defend, before judgment can be rendered against them. *Covington and Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

2. Judgment against infants constructively summoned, without appointment of guardian *ad litem* to defend for them, is erroneous and not void. *Simmons, &c.* v. *McKay, &c.*, 5 Bush, 25.

3. Suspension of judgment until a guardian could be appointed by county court, could not injure defendant, as he could have paid the money into court. *Mason, &c.* v. *Mason, &c.*, 5 Bush, 187.

4. Co-defendants on cross-petition of guardian *ad litem* cannot object to a judgment against them by infants who have not been summoned, but who appeared by guardian *ad litem*. *Mason, &c.* v. *Mason, &c.*, 5 Bush, 187.

GUARDIAN AND WARD.

1. See COUNTY JUDGE.

2. In a suit to declare a conveyance fraudulent, and sell a debtor's estate for the benefit of all his creditors, a judgment is erroneous which does not give priority to debts due as guardian or administrator. The infant ward of the debtor, not having been made a party, and not receiving (because of the enforced insolvency of her guardian) the balance due her, may afterwards recover a separate judgment against each creditor for the *pro rata* necessary to satisfy said balance. *Roberts and wife* v. *Phillips, &c.*, 11 Bush (March 5, 1875).

3. Where a petition charged that a county judge had carelessly and negligently failed to take a guardian's bond with good surety, and that the guardian and sureties were, when the bond was executed, totally insolvent, and that the judge had carelessly and negligently failed to make the guardian settle his accounts according to law, the demurrer thereto was improperly sustained. *Colter* v. *McIntire*, 11 Bush (Dec. 1, 1875).

4. Where the guardian's bond was so defectively executed as to be invalid, the judge was responsible to the person injured by the misfeasance. *Kinnison* v. *Carpenter, &c.*, 9 Bush, 599.

5. The ward alone has a right of action under the statute against the county judge for his failure to take a proper bond from his guardian; but *any one aggrieved by his misfeasance* in this regard may, on common law principles, maintain an action for damages. *Ibid.*

6. A guardian obtains judgment, and sells ward's land. He has given bond before both the county court and circuit court, with different sureties. They are equally liable for the proceeds of the land which came to the guardian's hands. *Elbert* v. *Jacoby*, 8 Bush, 542.

7. Although the statutory guardian has received money, under a judgment in a suit where there was a guardian *ad litem* appointed to defend, he may prosecute an appeal and have the judgment reversed. *Reed, &c.* v. *Louisville Bridge Co.*, 8 Bush, 69.

8. A second guardian sued the former guardian to recover estate of his ward in his hands; and being advised that such

demand was a preferred claim against the former guardian's estate, did not sue his surety. The debt was lost, because the claim was not prosecuted in due time against the surety, and the second guardian was held liable for the loss. *Hemphill, &c.* v. *Lewis*, 7 Bush, 214.

9. The chancellor may direct the sale of any of the infant's real estate, where proper to the maintenance and education of the ward or for the payment of his debts. (1 Stanton's Rev. Stat., 579.) *Jarret* v. *Andrews, &c.*, 7 Bush, 311. Where the ward has unproductive land, and the guardian makes advances necessary for her, without the previous direction of the chancellor, is no reason why he should not be allowed therefor; for, if the ward had no guardian, necessaries furnished her would be required to be paid for, and if the guardian does what the chancellor would authorize him to do, no reason is perceived to prevent the guardian from being remunerated. *Same*, 311.

10. It is the duty of a guardian to loan out the money of his ward, to make it yield interest; and if he does so, he has a right to require the ward, when he arrives at age, to take the solvent notes that the guardian holds as such. *Higgins, &c.* v. *McClure, &c.*, 7 Bush, 379.

11. In an action to sell real estate belonging in part to infants, the infant co-heirs must be defended by a guardian *ad litem*, although a person was appointed pursuant to sec. 543, of the Civil Code, to take care of their interests. *Girty and Frame* v. *Logan, &c.*, 6 Bush, 8.

12. When no bond can be found in the clerk's office of the county court—although the order appointing the guardian recited that bond with surety had been given, but in fact no bond was taken—the county judge will be liable. *Daniels* v. *Vertrees*, 6 Bush, 4.

13. Where three wards have a guardian appointed by the court, and only two were named in the bond that was executed, the other cannot recover on the bond. *Greenly, &c.* v. *Daniels*, 6 Bush, 4.

14. Where a guardian procures a judgment and sale of land by judgment of his wards, and then resigns: the successor has a right to receive the money on the sale bonds without giving

bond in the circuit court. *Herndon, &c.* v. *Lancaster's adm'rs, &c.*, 6 Bush, 483.

15. In the absence of a statutory guardian, the public guardian can take control of suits which he may find pending and not prosecuted for want of a statutory guardian. *Marshall* v. *Marshall*, 4 Bush, 248.

16. A guardian should be permitted to file an amended petition to cure defects in the proceedings to sell his ward's land, after the purchaser has filed exceptions to the sale, and after he has been ruled to pay the money into court. (3 Bush, 264.) *Mahoney, guardian* v. *McGee*, 4 Bush, 527.

17. A father should first be preferred, in the appointment of a guardian to his children. Next the mother, if there be no father; unless some controlling reason requires that another should be appointed; and even a woman married a second time, with her husband living, may be guardian by a former appointment during her widowhood—the marriage subsequent not avoiding her appointment. *Leavel* v. *Bettis*, 3 Bush, 74.

18. A release of one surety (the others not applying), and a new bond given with other sureties, makes them jointly liable with the unreleased sureties on the first bond executed by the guardian. *Boyd* v. *Gault, &c.*, 3 Bush, 644.

19. Where the ward resides with the mother, with the assent of the guardian, and she employs necessary medical aid for the ward, the guardian is bound to pay for it. *Walker & Green* v. *Browne, guardian, &c.*, 3 Bush, 686.

20. A reference by the county court to a commissioner to settle the accounts of a guardian, will not defeat a suit in equity by his successor for the same purpose. *Commonwealth, for use, &c.* v. *Henshaw, &c.*, 2 Bush, 286.

21. One surety in a guardian's bond may be released by order of the county court, and the others remain bound. *Watts* v. *Pettit's heirs*, 1 Bush, 154. The act to amend the law in relation to guardians is remedial; cases within the reason, though not within the letter, will be embraced by it, and those within the letter and not within the reason, will not be embraced by it. *Same*, 154.

22. A purchase, made by a trustee or guardian, of the trust property, or by the executor, of the estate of his testator, from

himself, during the continuance of the fiduciary character of the purchaser, will not be allowed to prevail. Such a purchase, however fair, is voidable, at the option of the *cestui que trust. Faucett* v. *Faucett, &c.*, 1 Bush, 511.

23. A guardian of an infant married woman cannot be made liable for her money paid to her husband, which he paid in good faith, without any notice or presumption of her non-concurrence. *Beazley, &c.* v. *Harris, &c.*, 1 Bush, 533.

24. But money paid to an infant husband, by the guardian of his infant wife, and invested by him in real estate, she has a lien on it for the amount of the money of hers thus invested. The question whether even the land passing to an innocent purchaser without notice of her lien would be affected thereby is left undecided, although stated. *Beazley, &c.* v. *Harris, &c.*, 1 Bush, 533.

HABEAS CORPUS.

See SUNDAY; and BONDS—STATUTORY, &c.

HEIRS AND DEVISEES.

1. See ADVANCEMENTS; DESCENT AND DISTRIBUTION; ESTOPPEL; EXECUTORS AND ADMINISTRATORS; and LIMITATIONS.

2. The petition, to recover from the heirs or devisees a debt owing by the ancestor or devisor, should describe the property sought to be subjected, or allege that the heirs or devisees received sufficient estate to pay the debt. *Trustees Kentucky Female Orphan School* v. *Fleming, ex'r, &c.*, 10 Bush, 234.

3. Limitation of fifteen years applies, in an action against an heir on the note of his ancestor, as in other actions on promissory notes. *Trustees Ky. Fem. Orphan School* v. *Fleming, ex'r, &c.*, 10 Bush, 234.

4. Sec. 6, chap. 40, Rev. Stat., is a re-enactment of the statute of 1792; and in order to proceed at law under it, against the heir or devisee, the personal representative shall be joined as defendant. *Hagan, &c.* v. *Patterson*, 10 Bush, 441.

5. If there be no personal representative, a suit in equity may be maintained against the heirs or devisees alone; and where they are infants, it must be alleged that personal estate has been distributed or real estate has descended to them; and a sale of real estate, if ordered, should be under the supervision of the chancellor, and not by the sheriff. *Hagan, &c.* v. *Patterson*, 10 Bush, 441.

6. A judgment against the husband of an heir is wrong, where the record does not show why the husband should be held responsible. *Hemphill, &c.* v. *Lewis*, 7 Bush, 214.

HIGHWAYS.

See ROADS AND PASSWAYS.

HOLIDAY.

1. It is error to render judgment upon service of summons executed on the Fourth of July, unless the case is within the exceptions enumerated in secs. 733, 734, and 735, Civil Code. *Paul* v. *Bruce & Co.*, 9 Bush, 317.

2. A summons, subpœna, etc., may be executed on a holiday, when the officer having the process believes, or the plaintiff, by affidavit, believes, that the process cannot be executed after such holiday. *Ibid.*

HOMESTEAD.

1. See EXEMPTIONS.

2. In a suit by creditors to set aside conveyances as fraudulent, and sell the property to satisfy judgments upon which executions had been returned "*no property found*," it was error, after the case had been prepared for trial, to refuse to file an amended answer in the nature of a petition, asking that a homestead be reserved. *Kueven, &c.* v. *Specker, &c.*, 11 Bush (March 4, 1875).

3. The right of homestead exemption depends upon the present and actual intention of the debtor to use and enjoy

the property as a home for himself and family; and that right does not exist where his residence is permanently located elsewhere. (Brown Bro. & Co. v. Martin & Co., 4 Bush, 50.) Having, by removal, lost his right to the exemption, his unexecuted intention to return and reside in his former dwelling had not re-established that right at the date when executions came to the officer's hands, and created a lien which was completed by the levies. *Carter, Fisher & Co., &c.* v. *Goodman, &c.*, 11 Bush (June 21, 1875).

4. The mortgage to the Kenton B. and S. Association does not pass the homestead exemption. Mrs. H. states expressly that she joined in its execution for the purpose of relinquishing her right and claim to dower. She only released her dower, she did not waive her homestead exemption. Its value, $1,000, must be set apart to her and husband, unless the realty is susceptible of division. (Wing v. Hayden, 10 Bush, 276; Robbins v. Cookendorfer, 10 Bush, 628.) *Herbert, &c.* v. *Kenton Building and Saving Association*, 11 Bush (Sept. 15, 1875).

5. If a debtor has a homestead right in a house wherein he resided, not subject to sale for the satisfaction of debts when it was created, he may exchange that residence for another, without losing his homestead right. The exemption homestead in one pays for a like exemption in the other, and nothing is withdrawn from creditors. *Thompson, &c.* v. *Heffner's ex'rs, &c.*, 11 Bush (Oct. 1, 1875).

6. A mortgage of the homestead exemption can vest no right superior to that of a creditor whose debt existed prior to the passage of the homestead law, nor pass any equitable interest affecting the claim of such creditor. *Gaines, &c.* v. *Casey, &c.* 10 Bush, 92.

7. The right to a homestead exemption may be waived by a sale of the property, or by a mortgage. *Gaines, &c.* v. *Casey, &c.*, 10 Bush, 92.

8. Whenever the debtor ceases to be a housekeeper or removes from the premises, the right to the exemption terminates, though mortgaged. *Gaines, &c.* v. *Casey, &c.*, 10 Bush, 92.

9. Homestead cannot be subjected to payment of debts after June 1, 1866, unless the debt existed prior to the purchase of the land. *Gardner, &c.* v. *Smith, &c.*, 10 Bush, 245.

10. Part of a tract of land having been sold to pay purchase money, the owner is entitled to have a homestead set apart to him in the remainder. Webster v. Bronston, trustee, &c. (5 Bush, 521), concurred in. *Gardner, &c.* v. *Smith, &c.*, 10 Bush, 245.

11. A sale of land under the judgment of court cannot divest the owner of his right to a homestead exemption, unless it has been waived. *Wing, &c.* v. *Hayden, &c.*, 10 Bush, 276.

12. The purchaser at such sale takes the land subject to the exemption, and should the debtor subsequently cease to be a housekeeper, it would not inure to the benefit of such purchaser. *Wing, &c.* v. *Hayden, &c.*, 10 Bush, 276.

13. Failure to claim a homestead is no waiver of the exemption. *Wing, &c.* v. *Hayden, &c.*, 10 Bush, 276.

14. The homestead right may be waived by a conveyance by the husband and wife purporting to convey the whole estate, with no limitation of the *feme's* acknowledgment. If she release only her dower, the homestead exemption is not waived. *Wing, &c.* v. *Hayden, &c.*, 10 Bush, 276.

15. Rents accruing from the homestead, while the persons entitled to the exemption were voluntarily out of possession, or which may have been voluntarily paid by them, cannot be recovered. *Wing, &c.* v. *Hayden, &c.*, 10 Bush, 276.

16. The wife, owning the fee, joined with her husband in conveying the whole estate, warranting the title, without limitation. *Held* to be a waiver of the homestead right. *Robbins, &c.* v. *Cookendorfer, &c.*, 10 Bush, 629.

17. The act of Feb. 10, 1866, exempting a homestead from sale under execution, was not intended to apply to the State, but only to individuals. A sheriff and his sureties are not embraced by said act, for revenues of the State collected by him. *Commonwealth* v. *Cook, &c.*, 8 Bush, 220.

18. The homestead act does not apply to debts created before June 1, 1866. The renewal of a note is not the creation of the debt, only the renewal of the obligation to pay. (Pryor, &c. v. Smith, 4 Bush, 379.) *Kibbey* v. *Jones*, 7 Bush, 243. If part of the debt existed before, and part after, June 1, 1866, the homestead will be subject to that part which was created before that time. *Same*, 243.

19. If the debt accrued before June 1, 1866, and the costs of collection afterwards, the homestead act does not apply to either. *Knight* v. *Whitman*, 6 Bush, 51.

20. Husband mortgaged homestead, in which wife did not join. In suit for foreclosure, he claimed the benefit of the homestead act. Judgment *in personam* against the husband, and petition as to foreclosure dismissed. Affirmed. *Thorn* v. *Darlington*, 6 Bush, 448.

21. A debtor has the right to convey homestead, even to prefer a creditor; and it will not come within the act of 10th March, 1856. *Lishy, &c.* v. *Perry, &c.*, 6 Bush, 515.

22. The act does not embrace a note executed after 1st June, 1866, for articles purchased and delivered before that date. *Marsh* v. *Alford and wife*, 5 Bush, 392.

23. A house and lot, under a deed of trust for the equal *pro rata* benefit of all the creditors, sold for $2,627.77 cents; the homestead was reserved in the deed, and claimed by the grantor. Debts prior to June 1, 1866, amounted to $1,616 81. Debts after that time amounted to $2,052 43. A *pro rata* distribution of the entire fund, except $1,000, was adjudged among all the creditors, and then applied so much of the $1,000 as was necessary to pay the prior debts. By an equal division of the court of appeals, the judgment was affirmed. *Webster* v. *Bronston, trustee, &c.*, 5 Bush, 521. The judges Williams and Hardin differed from the foregoing, and so did Peters and Robertson; and wrote several opinions, which see.

24. The right of the homestead does not exist, when the residence of the debtor and his family is permanently elsewhere than the place asked to be set apart. *Brown, &c.* v. *Martin & Co.*, 4 Bush, 47.

25. When the actual homestead is mortgaged and sold, the mortgagor is not entitled to a homestead in other land against his then existing creditors. *Jarboe, &c.* v. *Colvin, &c.*, 4 Bush, 70. The *obiter dictum* in this case—that the mortgage of the dwelling and home waives the right to the exemption of the homestead—has been overruled *supra.*

HOMICIDE.

See CRIMINAL LAW AND PROCEEDINGS.

HORSE STEALING.

See CRIMINAL LAW AND PROCEEDINGS.

HUSBAND AND WIFE.

1. See CURTESY (9 Bush, 679); PURCHASER; and WAR.

2. The contract of a *feme covert*, unless in regard to her separate estate, is not only voidable but absolutely void. She has no power to bind herself by a contract to purchase land, nor can the acts of her husband bind her. *Robinson, &c.* v. *Robinson's trustee, &c.*, 11 Bush (April 20, 1875).

3. A conveyance, by husband and wife, of certain real and personal estate belonging to the wife, to trustees—1st, to secure them for advances they may make to the grantors, and 2d, to re-convey the same (if no pending liability on the trustees), upon the written request of the first parties or the survivor of them, in fee simple, to the first parties or the survivor of them—indicates the wife's fixed and settled purpose to give to her husband the whole of her estate; and unless undue influence and other evidences of fraud be shown, will be sustained. (18 B. Monroe, 908; Scarborough v. Watkins and wife, 9 B. Monroe.) *Kennedy, &c.* v. *Ten Broeck, &c.*, 11 Bush (June 26, 1875).

4. A power of attorney, executed by a wife to her husband, to sell and dispose of all her estate, is void in Kentucky. *Kennedy, &c.* v. *Ten Broeck, &c.*, 11 Bush (June 26, 1875).

5. A *feme covert* can be invested, by deed or will emanating from a third party, with a power of appointment in lands; still, as long as she is covert she cannot—either by her own deed, or in conjunction with her husband—vest herself with such a power in or over her general estate. She can only dispose of her lands in the manner pointed out by the statutes. *Kennedy, &c.* v. *Ten Broeck, &c.*, 11 Bush (June 26, 1875).

6. Even though living separate and apart from her husband, a married woman cannot sue for battery upon her own person without joining her husband; and if he refuse to be joined, she cannot make him defendant, and is thus without remedy. The husband's right is complete, to damages growing out of torts to the person or reputation of his wife. He has the power to release such damages before they are paid; and if collected during his life, he may, by reducing them to possession, make them his absolute property. *Anderson, &c.* v. *Anderson,* 11 Bush (Sept. 24, 1875).

7. A married woman, who has the right jointly with her husband to prosecute an appeal, cannot avail herself of her disability of coverture to stop the running of the statute which bars an appeal after three years. (Helm v. Bentley, 1 Metcalfe, 510.) *Farlee, &c.* v. *Rodes,* 11 Bush (Oct. 1, 1875).

8. In proceedings for the sale of a married woman's real estate, her title will not pass unless there is a strict compliance with all the requisites of chapter 63, Gen. Stat. *Bridgeford & Co.* v. *Beck, &c.,* 11 Bush (Nov. 12, 1875).

9. The General Statutes have abrogated or changed the law in relation to the sale of the real estate of married women, owned jointly with others and not susceptible of division. *Bridgeford & Co.* v. *Beck, &c.,* 11 Bush (Nov. 12, 1875). [Stump v. Martin, 9 Bush, 285, was decided before the General Statutes went into operation, and the decision conformed to the statutes then in force. EDITOR.]

10. The land of an infant married woman was exchanged for another tract, the wife joining with the husband in the deed. After the wife arrived at age, she refused to ratify the exchange; and, her husband declining to join, she sued in her own name to cancel the contract and recover the land, making the vendee and her husband defendants. *Held*—she had the right to sue in her own name, and a next friend was unnecessary. (Civil Code, sec. 49; Matson v. Matson, 4 Met., 262.) *Hardin* v. *Gerard, &c.,* 10 Bush, 259.

11. The deed executed by the husband and infant wife passed no estate during the life of the wife, except the right to the use for a period not exceeding three years; and conferred on the vendee no right whatever after that time as against the wife.

(Sec. 1, art. 2, chap. 47, Rev. Stat.) *Hardin* v. *Gerard, &c.*, 10 Bush, 259.

12. The wife's right to recover her land being a legal one, she is entitled to enforce it without regard to her condition. *Hardin* v. *Gerard, &c.*, 10 Bush, 259.

13. A demand of possession or notice to quit was unnecessary, as the vendee was not a tenant, but in possession, claiming adversely. (Isaacs v. Gearheart, 12 B. Mon., 235.) *Hardin* v. *Gerard, &c.*, 10 Bush, 259.

14. That no deed was tendered—reconveying the land taken in exchange—will not defeat the suit; as the chancellor will order such conveyance as justice demands. *Hardin* v. *Gerard, &c.*, 10 Bush, 259.

15. The allegation that the husband had refused to join in the suit was not traversable, and the issue thereon was immaterial. *Hardin* v. *Gerard, &c.*, 10 Bush, 259.

16. A debtor's right of action to recover exempted property, on his death, passes to his widow, for herself and infant children. *Myers' adm'r, &c.* v. *Forsythe*, 10 Bush, 394.

17. Where the proceeds of the sale of exempted property under attachment are in court at the death of the debtor, they pass to the widow and children. The presence of the wife at the sale, and not objecting, was no waiver of her right. *Myers' adm'r, &c.* v. *Forsythe*, 10 Bush, 394.

18. Where a husband and wife are sued for a debt of the wife created before marriage, an amended petition averring that they had since been divorced, and seeking judgment against the wife, sets up no new cause of action. *Joyes* v. *Hamilton*, 10 Bush, 544.

19. A judgment against persons jointly liable is an entirety, and if void as to one is void as to all. But where it is several as to the parties, it may be reversed as to one and affirmed as to another. *Joyes* v. *Hamilton*, 10 Bush, 544.

20. A judgment against a divorced wife for her debt, and also against the husband as to property received by the marriage, if void as to the husband, will not be void as to the wife. (55 Maine, 252; 9 Mass., 532.) *Joyes* v. *Hamilton*, 10 Bush, 544.

21. A husband, by a distinct, unequivocal act, may permit his wife to set apart the proceeds of her general estate to her own separate and exclusive use. *Penn* v. *Young*, 10 Bush, 626.

22. If the husband desires to convert the wife's earnings as such into separate estate, for her use exclusively, he must have the privileges of a *feme sole* conferred on her, by a court of equity. (Uhrig v. Horstman & Sons, 8 Bush, 172.) *Penn* v. *Young*, 10 Bush, 626.

23. A husband may keep the proceeds of his wife's general estate distinct from his general business, may loan out the same, taking notes payable to her, and recognize her ownership of such notes, and still it will be *prima facie* the general estate of the wife, liable to be reduced to possession by the husband, and such estate as he will take by survivor in case of his wife's death. *Penn* v. *Young*, 10 Bush, 626.

24. By the common law, a married woman, whose husband was banished or who had abjured the realm, might act as *feme sole*. *Hannon* v. *Madden*, 10 Bush, 664.

25. Sec. 3, art. 2, chap. 47, Rev. Stat., provides for every contingency in which it can become necessary for a married woman to act as *feme sole*. *Hannon* v. *Madden*, 10 Bush, 664.

26. The legislature intended this statute as a substitute for the common law, and not as merely cumulative. Its provisions are to be literally construed. *Hannon* v. *Madden*, 10 Bush, 664.

27. The wife did not obtain the life-estate "in consideration or by reason of the marriage," within the meaning of the statute in this case—where the husband, during the marriage, in consideration of love and affection, conveyed real estate in trust for the use of his wife during life, remainder to his children. *Phillips* v. *Phillips*, 9 Bush, 183.

28. The interest of the husband in land held by himself and wife, as tenants by entireties, may be sold by a court of equity, and its proceeds applied to the payment of his debts; provided it be so done as neither to affect his right of survivorship nor her right to the enjoyment of the land during her life, whether she survives her husband or not. *Cochran & Fulton* v. *Kerney and wife*, 9 Bush, 199.

29. The act of Feb. 13, 1846, deprived creditors of a husband of the right to subject to the payment of their debts an

estate of this character, in such manner as to deprive him of the possession during the life of his wife. *Cochran & Fulton* v. *Kerney and wife*, 9 Bush, 199.

30. Since the passage of said act, the husband has, in his wife's lands, no interest which is liable for his debts. (Moore v. Moore, 14 B. Mon., 208.) *Ibid.*

31. The husband cannot, by any act of his, prejudice his wife's right of survivorship in land held by them as tenants by entireties; and his creditors have no power to deprive her of its enjoyment, while it remains undetermined whether she or her husband will ultimately become sole owner of the fee. *Cochran & Fulton* v. *Kerney and wife*, 9 Bush, 199.

32. The husband's estate in land held by himself and wife, as tenants by entireties, the court is inclined to think, is so fettered, by said act of 1846 and the Revised Statutes, as to be exempt from seizure and sale under execution. *Ibid.*

33. The provisions of the Revised Statutes, requiring the renunciation of the provisions of the will by the widow, within twelve months after probate, is not imperative. The object of the enactment was to facilitate the settlement and distribution of estates, and the widow's right to dower by the statute is made to depend upon her renunciation within the twelve months. *Smither* v. *Smither's ex'r*, 9 Bush, 230.

34. A widow can make an election in a mode other than that pointed out by the statute. *Ibid.*

35. The chancellor may postpone the widow's right to renounce the will beyond the twelve months, "until the condition of the estate is ascertained by the confirmation of the commissioner's report of settlement." *Ibid.*

36. A marriage brought about by force and duress is void. *Bassett* v. *Bassett*, 9 Bush, 696.

37. A marriage celebrated according to the forms of law is *prima facie* valid. The *onus* of showing its invalidity is on the party seeking to annul it, and he is not a competent witness. *Ibid.*

38. Husband and wife are not competent to testify against each other. *Ibid.*

39. Separate estate for a married woman may be created by devise, deed of conveyance, sale or gift in writing or parol by a

third party. The husband may permit his wife to set apart the proceeds of her general estate to her separate and exclusive use; or he may, by an antenuptial agreement or post-nuptial settlement, properly executed, and free from fraud as to creditors, give her all or a portion of his estate, to be held and enjoyed by her. In order that her earnings, or profits in trade and business, may be protected from his creditors, the chancellor, upon their joint petition, can make an order allowing her to trade, etc., as *feme sole*. (Act Feb. 14, 1866, Myers' Sup., 728; see art. 2, chap. 47, Rev. Stat., 2 Stanton, 12; and Gen. Stat., title HUSBAND AND WIFE.) *Uhrig, &c.* v. *Horstman & Sons*, 8 Bush, 172. [This statute enlarges her rights. As between herself and husband, she can own separate estate, her earnings in trade, etc., it is apprehended, without any order under said acts. EDITOR.]

40. Where a deed of trust for the use of a married woman provides that, if she shall survive her husband, the property shall revert to her: it does so by his death, leaving her surviving as if no deed had been made. *Churchill* v. *Reamer, &c.*, 8 Bush, 256.

41. She died, leaving children by the first marriage, and one, an infant, by her second marriage. In the property aforesaid, her husband, who survived her, became entitled to an estate by curtesy; but as to other property held in trust for her during life, he did not take curtesy therein, and did not inherit from his infant child, who died after the mother. *Same*, 256.

42. A gift of a house and lot and $1,500 in money, in contemplation by the husband of living apart from his wife permanently, had the effect of placing the property beyond his control; and although the deeds did not technically create a separate estate, yet the acts of the parties impressed that character on it, and she had a right to dispose of it by will, without and against his consent. *Hiram (of color), &c.* v. *Griffin, &c.*, 8 Bush, 262.

43. The will of a married woman is restricted by law to such estate as she is entitled by law to dispose of by will; and the judgment of probate cannot of itself give the will effect as to land which was her general estate. *Mitchell and wife* v. *Holder*, 8 Bush, 362.

44. All that is required to create a separate estate in a married woman is, that the intention is manifestly shown that it is to be for her separate enjoyment. *Hathaway, &c.* v. *Yeaman*, 8 Bush, 391.

45. An insolvent debtor cannot take his means, and insure his life for his wife's benefit, to the prejudice of his creditors. *Stokes and Son, &c.* v. *Coffey, &c.*, 8 Bush, 533.

46. A married woman may mortgage her estate to secure prior debts of her husband. (2 Met., 235; same, 503; 5 Bush, 396.) *Hobson, &c.* v. *Hobson's ex'r*, 8 Bush, 665. By executing a mortgage she does not become her husband's surety for the debt, but the mortgage is a security; and although more than seven years elapse after the mortgage matures, the limitation applicable to sureties does not apply, and the debt can, notwithstanding the seven years have elapsed, be made out of the mortgaged property. *Same*, 665.

47. "Necessaries for herself or any member of her family, husband included," includes food, shelter, raiment, or other comforts for the family; but does not include debts incurred for the husband's relief from imprisonment, impressment, or other liability unconnected with family sustentation, nor include a debt for a substitute. *Ford, &c.* v. *Teal*, 7 Bush, 156.

48. Husband devised his estate to his wife during life or widowhood without any devise over. By holding the estate under the will she renounced all claim to dower; and by electing to marry she renounced not the will, but the estate of her deceased husband. She could not hold as devisee during widowhood, and then marry and claim as if she had not so held or married. *Smith and wife* v. *Bone, &c.*, 7 Bush, 367.

49. Separate estate of wife, in furniture purchased with her money, can be created by parol, and is not subject to husband's creditors. *Miller and wife* v. *Edwards*, 7 Bush, 394.

50. An acknowledgment in a note, given by husband and wife, that it was for necessaries, is not sufficient to charge the wife's estate; nor that the credit was given to her. Her general estate is liable for necessaries, but not her separate estate. *Gatewood* v. *Bryan*, 7 Bush, 509. But see sec. 17, art. 4, chap. 52, Gen. Stat., and authorities referred to.

51. A wife's general property may, during her infancy, be converted into separate estate by an antenuptial settlement and conveyance to a trustee. *Duvall and wife* v. *Graves*, 7 Bush, 461.

52. Slaves could not contract marriage; their living together as man and wife, and recognizing each other as such, constitute them husband and wife *de facto;* and no legal rights could be acquired by themselves or offspring from such relation. But after emancipation, they could contract marriage by cohabitation, etc., before the Revised Statutes. *Ewing* v. *Bibb, &c.*, 7 Bush, 654.

53. A verbal lease of wife's lands by husband and wife, or a written lease by him alone, is void; and her acceptance of rent after his death, will not affirm the contract. But if she joins in a written lease, it is not void. *Wintsell, &c.* v. *Hehl*, 6 Bush, 58.

54. Separate estate of a married woman is such as has been vested in her for her separate use, to the exclusion of her husband's marital rights. (14 B. Mon., 247; 2 Bush, 112.) *Shackleford, assignee, &c.* v. *Collier, &c.*, 6 Bush, 149.

55. No form of words is necessary to create such separate estate, and it may be done in personal estate without writing, or in any property that can be transferred without writing. (2 Story, 1381; Clancy on Rights of Married Women, 262; 17 B. Mon., 111; 2 Met., 509.) If the acquisition was in consideration of money or property of the husband, the wife's claim will be made to yield to antecedent creditors. *Same*, 149.

56. If the husband's labor and attention to the wife's business, on the land of his wife held for her separate use, exceeds the cost of supporting himself and family, his creditors will be entitled to the excess, if it be shown that the portion not needed therefor was the result of his labor and care. And her statements, while in possession, are admissible to show how she holds the property, and the character of her title. *Commonwealth for use of Bennyworth, &c.* v. *Fletcher, &c.*, 6 Bush, 172.

57. A married woman received a conveyance of land which had been previously conveyed to another, and her husband had notice of the first conveyance. *Held*—that that was notice to his wife. *Bennett and wife* v. *Titherington, &c.*, 6 Bush, 192.

58. If the parties to a marriage believe that the person solemnizing it had authority to do so, it is valid. *Robinson* (*of color*) v. *Commonwealth*, 6 Bush, 309.

59. There must be clear proof that a parol gift of personal estate to a married woman, for her separate use, to the exclusion of the rights of the husband, was so made to give her a separate estate therein. *Walton* v. *Broaddus*, 6 Bush, 328. If the money was hers, and never reduced to possession by him, and she purchased the property for her separate use, the transaction was not fraudulent, nor was any legal principle violated thereby. *Same*, 328. (17 B. Mon., 111; 2 Met., 509.)

60. A married woman may be authorized by deed, or by a court of chancery, to trade as a *feme sole;* and if by deed, her estate can be made liable to her debts without any writing. *Hackett & Callaghan* v. *Metcalfe, &c.*, 6 Bush, 352.

61. The wife is entitled to one-third of the proceeds of real estate, as distributee of a deceased partner, which has been purchased with partnership funds for partnership purposes, after paying the partnership debts. *Cornwall, &c.* v. *Cornwall, &c.*, 6 Bush, 369.

62. The husband purchased real estate, held in trust for his wife and children and sold under chancellor's decree—the sale being advantageous to the beneficiaries. He held the property freed from any trust. *Norman* v. *Norman*, 6 Bush, 495.

63. A married woman is not liable on a note, executed by herself and husband, for the excess of money out of the estate of her grandmother paid to her; but if the money was laid out in land, then she would hold the land in trust for those who would be entitled to the money, and the land would be liable therefor. *Thatcher, &c.* v. *Cannon, &c.*, 6 Bush, 541.

64. A married woman has a right to have the judgment opened, and a new trial where her condition does not appear in the record. (Civil Code, subsec. 5, of sec. 579.) *Adams* v. *Jett's adm'r*, 6 Bush, 585; *Mitchell* v. *Moore, assignee, &c.*, 6 Bush, 659.

65. A *feme covert* is not liable on her warranty or assurance, in the sale and conveyance of land. (16 B. Mon., 637.) *Curd* v. *Dodds, &c.*, 6 Bush, 681.

66. Supplies used in keeping a hotel for profit, and not a mere means of support, cannot be regarded as necessaries. *Harris* v. *Dale & Co.*, 5 Bush, 61.

67. A widow having funds of her deceased husband in her possession, is bound to surrender them to his administrator. *Cook* v. *Burton's admr'*, 5 Bush, 64.

68. Possession of the wife's land, under a conveyance of the husband, does not become adverse until she becomes discovert; and the statute of limitations will not bar her until fifteen years after the husband's death; but if she had attempted, but ineffectually, to convey her interest in the land, her right of action will be barred after three years after his death. *Stephens* v. *McCormick, &c.*, 5 Bush, 181.

69. She may join with her husband, and mortgage her estate for the pre-existing debts of her husband; but she is not estopped by recitals in the note and mortgage from showing the true consideration, and the husband is a competent witness for the heirs of the wife and her administrator for that purpose. *Sharp's adm'r* v. *Proctor's adm'r and heirs*, 5 Bush, 396.

70. If husband and wife sell her land, and he promises to reinvest it in another tract for her, and purchases and takes the title bond in his own name, a court of equity will compel a compliance of the oral contract to the extent that her money was invested in the land. *Mallory* v. *Mallory's adm'r*, 5 Bush, 464.

71. An oral antenuptial contract, that neither party was ever to claim or interfere with the property of the other, is binding. *Southerland* v. *Southerland's adm'r*, 5 Bush, 591.

72. Property conveyed to a woman and her child or children, the child born *eo instanti* becomes joint tenant with the mother, and the power given to the husband to sell and convey, with the concurrence of the mother, does not authorize a conveyance of the child's interest to the mother. *Powell* v. *Powell, &c.*, 5 Bush, 619.

73. Lands conveyed to a married woman as her separate estate for life, to go to such persons at her death as will inherit as heirs-at-law: the absolute title may be sold during the existence of the particular estate, under the act of August 23, 1862 (Myers' Sup., 426), and the husband need not give bond, as the law requires

the court to appoint a commissioner to reinvest the proceeds. *Terrill, &c.* v. *Spence and wife, &c.*, 5 Bush, 637.

74. Residence of the husband is in legal contemplation the domicile of the wife, although living in different States. *Hick* v. *Hick*, 5 Bush, 670.

75. Where the husband takes the proceeds of a note assigned to his wife for her property, and applies it to improving land for which he holds a title bond, she cannot follow the proceeds, and require an equitable settlement out of them, to the prejudice of the husband's creditors. *Watson* v. *Robertson*, 4 Bush, 37.

76. Husband and wife conveyed real estate to a trustee, with power to sell and hold proceeds for separate use of the wife; conveyance in which husband and wife joined passed the title to purchaser. *Belknap* v. *Martin*, 4 Bush, 43.

77. To bind a married woman for necessaries, it is necessary that the original credit be given to her. *McMahan* v. *Lewis*, 4 Bush, 138.

78. Where a married woman, with her husband, sells and conveys her land, under an agreement in parol with the husband, that he will purchase another tract, and that so far as her money goes she shall be interested in the tract purchased; under attorney's advice that, to the extent of her money, an interest in the land will be secured in trust to her, the deed is made to him; husband's creditors will take the land, excluding her from any interest in it. *Pryor, assignee, &c.* v. *Smith, &c.*, 4 Bush, 379.

79. When a deed expressly authorizes the subjection of the separate estate, therein conveyed to her separate use, to the payment of a married woman's debts, any of her creditors can subject it without making other creditors parties. *Goldburg and wife* v. *Drabelle*, 4 Bush, 426.

80. A married woman purchased goods and gave her own note, and refused to surrender the goods to her husband's administrator after his death. She is liable to a personal judgment therefor. *Hunter* v. *Duvall, Ketchum & Co.*, 4 Bush, 438.

81. A husband makes a better provision for his wife than the chancellor would do, she being separated from him—upon which she acts so long as he lives. After his death she cannot claim dower and distribution of his estate—having, by the agreement

with her husband, relinquished them. *Loud* v. *Loud*, 4 Bush, 453.

82. A conveyance to a husband and wife and their heirs jointly, constituted an estate by entireties, and the survivor took the entire estate. The Revised Statutes changed the common law, but they are not retrospective. *Elliott, &c.* v. *Nichols, &c.*, 4 Bush, 502. (1 Dana, 243; 3 Bush, 454.)

83. The assignee of the wife's legacy, choses in action, etc., by the husband, takes them subject to her right to an equitable settlement, or to her right of survivorship, if not reduced to possession before the husband's death. *Dunn* v. *Lancaster*, 4 Bush, 581.

84. To entitle the surviving husband to curtesy in his wife's land, he must have had actual seizin during her life. *Conner and wife* v. *Downer, &c.*, 4 Bush, 631.

85. A husband can waive his marital right to his wife's money, choses in action, and personal property; and when that is clearly manifested by him, there being no creditors, courts of equity will not deprive the wife of the property. *Bryant's adm'r* v. *Bryant*, 3 Bush, 155.

86. An account for necessaries furnished by a merchant to the family of a married woman, while her husband was a member thereof, imposed no obligations on her or her inherited estate. *Lee, &c.* v. *Morris*, 3 Bush, 210.

87. The separate estate of a married woman is that alone which she may dispose of as she pleases. *Bowen* v. *Sebree and wife*, 2 Bush, 112.

88. A house and lot conveyed to a trustee, for the use of the married woman for life, and at her death to the issue of herself and husband, and, if none, to her heirs and devisees. If she dies before the husband, the property to revert to husband and his heirs. She held a life estate in the property, and not a separate estate. *Same*, 112.

89. Should the husband survive the wife, he is entitled to her choses in action by distribution, and to her personal estate reduced to possession or afterwards so reduced. *Rawlings' ex'r* v. *Landes, &c.*, 2 Bush, 158. (13 B. Mon., 451.) Also, to the vested interest in proceeds of land of his wife, directed to be sold. *Same.*

90. Before the act of Feb. 14, 1866, negro slaves in Kentucky could not be married. A note executed by a negro woman—who had lived and was then living with a negro as her husband, after the constitutional amendment gave her freedom—was held binding on her, although she and her husband, on April 19, 1866, complied with the above act. *Stewart, &c.* (*of color*) v. *Munchandler*, 2 Bush, 278.

91. Land held by a trustee, for the separate use of the wife, cannot be leased by the husband. *Carter, &c.* v. *Carter*, 2 Bush, 288.

92. A conveyance to the husband, in trust for the use, benefit, and behoof of the wife, does not create a separate estate in her. Her joint bond, with the husband, for a musical clock, not binding on her, and payments made thereon after his death do not bind her for the residue. *Guishaber* v. *Hairman, &c.*, 2 Bush, 320.

93. Lands purchased by or with the separate funds of the wife, acquired by her own skill and industry, and conveyed directly to her, cannot be subjected to payment of the husband's debts. *Marshall, &c.* v. *Marshall, &c.*, 2 Bush, 415.

94. Friendly and confidential letters, received during girlhood and first marriage, as well as those from her second husband during widowhood, are the peculiar property of the wife—which she may dispose of regardless of her husband's will. *Grigsby and wife* v. *R. J. Breckinridge*, 2 Bush, 480.

95. A conveyance of land made by the husband to the use of his wife, to carry out a previous undertaking and trust for which she paid an ample pecuniary consideration — she having the legal title, untainted with illegality or fraud—cannot be disturbed. *Latimer, &c.* v. *Glenn, &c.*, 2 Bush, 535.

96. And where he, in consideration of personal estate coming by distribution or bequest from her relatives, makes a settlement upon his wife and his children, to no greater extent than a court of equity would compel him to do, it will be held valid. *Same*, 535. (2 Story's Equity, sec. 1377*a*.) And when she charges upon, or make advances to her husband as a loan out of, her separate estate, she will be afforded the same remedies as any other creditor. *Same*, 535. (Clancy on Husband and Wife, 590.) And when she permits her husband to convert her land

into personalty, the law presumes it to be a gift unless repelled by evidence. *Same*, 535.

97. Since the adoption of the Revised Statutes, there can be no such thing in Kentucky as a marriage by cohabitation and recognition. *Estill* v. *Rogers*, 1 Bush, 62.

98. A husband is usually entitled to the custody of his children; but sometimes the wife is entitled to their custody, being the most appropriate person to take care of them. *McBride* v. *McBride*, 1 Bush, 15.

99. A wife holding a note on her husband, which her father gave to her as her separate estate, is entitled to the same rights, etc., as other creditors against his estate. *Martin, Cobb & Co.* v. *Curd's adm'r*, 1 Bush, 327.

100. A lien created by the laws of Louisiana, in favor of the wife, upon the estate and future acquisitions of her husband, will be enforced in this State. The lien inures to the benefit of the children of such estate; and when her personal estate, which came to his hands, exceeds the value of the estate left by him at his death, his second wife is not entitled to dower or distributive share in his estate. *Kendall, &c.* v. *Coons, &c.*, 1 Bush, 530.

IDIOTS AND LUNATICS.

1. The capacity of a party to make a deed is to be tested at the time the same was executed or was acknowledged; and when a party is adjudged to be a lunatic, the presumption of law is that he continues so. A person must show that the lunatic was in a lucid interval, or that insanity had ceased, when a deed was executed. But such a presumption does not exist, where the paroxysms were periodical or where the diseased condition of the mind is temporary. *Carpenter, &c.* v. *Carpenter*, 8 Bush, 283.

2. The appointment of a committee for an idiot does not *ipso facto* substitute him for a trustee holding funds for the benefit of the idiot. *Canaday* v. *Hopkins, committee, &c.*, 7 Bush, 108. In this case, a paper was filed by consent, to present it in lieu of pleadings; but it was not an agreed case, according to the Code. *Same*, 108.

3. Restitution of a person adjudged to be of unsound mind to the control of his estate, by a second inquest, did not divest the circuit court of jurisdiction of the proceedings instituted by the committee to sell estate to pay debts. *Salter, &c.* v. *Salter's creditors, &c.*, 6 Bush, 624. The levy of an execution having created an encumbrance on the estate of the person of unsound mind, his committee had the right to pay the debt and look to the estate for reimbursement. He did not lose his right by enjoining the debt, under the advice of counsel to litigate the debt in behalf of the estate; and he and his sureties in the injunction bond were properly protected. *Same*, 624.

4. The wife and children of a person alleged to be of unsound mind, in their petition charged that their home had been sold under execution, at an enormous sacrifice, in consequence of his unsoundness of mind, and prayed to set aside the sale, and for general relief. *Held*—that an inquest should have been held, and if the person was found to be of unsound mind, a committee should be appointed to prosecute the petition with him and in his behalf. *Shaw, &c.* v. *Dixon*, 6 Bush, 644.

5. The estates of lunatics are chargeable for necessaries which are reasonable and beneficial to them. (3 J. J. Marshall, 662; 1 Parsons on Contracts, 312.) *Coleman, &c.* v. *Frazer, &c.*, 3 Bush, 300.

6. For money advanced to pay off encumbrances, the person advancing it will be subrogated to the benefit of the encumbrance. Where a widow held a life estate in land, and with her resided an idiot son and a son-in-law, during the life of the mother, the son-in-law cannot charge for taking care of the idiot; but for his services after her death he should be paid a reasonable compensation. And the statute (art. 3, chap. 96, Rev. Stat., 2 Stanton, 410) against a recovery for diet, etc., without an agreement therefor, does not apply to an idiot. *Combs* v. *Beatty, &c.*, 3 Bush, 613.

ILLEGALITY OF TRANSACTION.

The benefit of the public, and not the advantage of the defendant, is to be considered, in cases in which one or more of several parties *in pari delicto* rely for defense upon the illegality

of the transaction out of which the claim arises. The presumption is in favor of the transaction; and if it be susceptible of two meanings—one legal, the other not—that will be put upon it which will support and give it operation. (2 Chitty on Contracts, 977; Mittleholzer v. Fullerton, 6 Q. B., 989; Lewis v. Davidson, 4 M. & W., 684.) *Bibb, &c.* v. *Miller, &c.*, 11 Bush (Sept. 21, 1875).

IMPEACHMENT.

The board of aldermen of the city of Louisville, not being legally sworn, were not authorized to try Mayor Tomppert. The proceedings to oust him were void; and Lithgow, the appointee of the general council, became a usurper. *Tomppert* v. *Lithgow*, 1 Bush, 176.

IMPROVEMENTS.

See RENTS AND IMPROVEMENTS.

INDICTMENTS AND PRESENTMENTS.

1. See CRIMINAL LAWS AND PROCEEDINGS.

2. A motion to set aside an indictment because one of the grand jurors is disqualified, is in the nature of a plea in abatement, and must be made promptly; otherwise, the right to make it is waived. *Commonwealth* v. *Pritchard*, 11 Bush (Sept. 13, 1875).

3. The only act imposing penalties for selling, etc., liquors to minors, is the act of March 22, 1871. *Baer* v. *Commonwealth*, 10 Bush, 8.

4. The indictment failing to show that the accused was a licensed vendor of spirits, the only penalty was a fine of $50. *Baer* v. *Commonwealth*, 10 Bush, 8.

5. The jurisdiction of the court of appeals in cases of misdemeanor is limited, by act of March 1, 1860, to prosecutions in which the punishment may exceed a fine of $50, or impris-

onment for thirty days, or both. *Baer* v. *Commonwealth*, 10 Bush, 8.

6. Though several persons be jointly indicted for distinct offenses—charged to have been jointly committed, when not susceptible of a joint commission—if the indictment charged the one on trial in person, the judgment should not be arrested. *Weatherford* v. *Commonwealth*, 10 Bush, 196.

7. When the indictment is joint, but it is in proof that the party on trial was the only one concerned, a verdict and judgment may go against him as though he was indicted alone. (Bishop on Criminal Procedure, sec. 223.) *Weatherford* v. *Commonwealth*, 10 Bush, 196.

8. Grand jurymen must be citizens, housekeepers of the county, and over 21 years. (Rev. Stat., chap. 55, art. 1, sec. 1.) If any of the grand jury have not these qualifications, their indictments must be set aside. (Crim. Code, sec. 159.) *Commonwealth* v. *Smith, &c.*, 10 Bush, 476.

9. A motion to set aside an indictment is waived, if not made when the case is called for trial. (Crim. Code, sec. 158.) *Commonwealth* v. *Smith, &c.*, 10 Bush, 476.

10. Objection to the indictments because one of the grand jurors was not a housekeeper, made at the second term after defendant was before the court on process, came too late. *Commonwealth* v. *Smith, &c.*, 10 Bush, 476.

11. The indictment must state the acts constituting the offense, in ordinary and concise language, and be direct and certain as regards the party and the offense charged, where they are necessary to constitute a complete offense. *White* v. *Commonwealth*, 9 Bush, 178.

12. No indictment is insufficient by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits. *Ibid.*

13. If any person shall willfully kill, disfigure, or maim any horse, etc. (Sec 8, art. 25, chap. 28, Rev. Stat., 1 Stanton, 411.) Under this statute, to charge that defendant did unlawfully shoot and kill a bay mare, was not sufficient. *Commonwealth* v. *Turner*, 8 Bush, 1.

14. To charge that the defendant unlawfully and without felonious intent destroyed, injured, and carried away timber from

four trees on the premises of John W. Wash, which said property belonged to the said Wash, and was taken without his consent, *held* sufficient. *Commonwealth* v. *Powell*, 8 Bush, 7.

15. Failing to set up list of tavern rates: The indictment was defective, because it did not allege that the rates had been fixed one month before the finding of the indictment. *Jackson* v. *Commonwealth*, 7 Bush, 99.

16. An indictment under act of March 2, 1860 (Myers' Sup., 517), must allege that the minor is a white person. *Commonwealth* v. *Ewing*, 7 Bush, 105.

17. Persons jointly indicted cannot be witnesses for each other, until the indictment is disposed of as to the one offered as a witness. (17 B. Mon., 318; 1 Met., 16.) *Edgerton* v. *Commonwealth*, 7 Bush, 142.

18. Permitting games of cards in a coffee-house, for treats of liquor and cigars, indictable. *Stahel* v. *Commonwealth*, 7 Bush, 387. (18 B. Mon., 491.)

19. Carrying concealed deadly weapons about the person, even for a harmless purpose, indictable. *Cutsinger* v. *Commonwealth*, 7 Bush, 392.

20. Ownership of property must be averred in an indictment for larceny, unless some excuse appears, as, that the owner is to the grand jury unknown. *Reed* v. *Commonwealth*, 7 Bush, 641. (Criminal Code, sec. 129.)

21. For selling liquor to a minor, the indictment should show that the defendant did not have the written consent; also, that he did not have the written request of the father, &c. *Commonwealth* v. *Hadcraft*, 6 Bush, 91.

22. Indictment for "malicious mischief in shooting and killing, by defendant, the sheep of A. C. willfully and unlawfully, without the owner's consent," is good. *Commonwealth* v. *Smith*, 6 Bush, 263.

23. To charge that J. W., on Dec. 24, 1868, in the county and State aforesaid—he having a wife then living—did unlawfully marry L. F., against the peace, &c., is good. *Commonwealth* v. *Whaley*, 6 Bush, 266.

24. To erect a fence across a road, indictable. *Commonwealth* v. *Mills*, 6 Bush, 296.

25. For setting up and keeping a keno table, it must be averred that it was a banking game, or contrivance ordinarily used for gaming purposes, or that it was an ordinary game for betting or hazard. Not so with faro. *Commonwealth* v. *Monarch*, 6 Bush, 298; and *Commonwealth* v. *Monarch*, 6 Bush, 301. [See both opinions.]

26. Throwing dice to determine who shall pay for the whisky, indictable. *McDaniel* v. *Commonwealth*, 6 Bush, 326.

27. An indictment for selling goods without license, should state that the sale was without license, and judgment should be arrested for defect in so averring. (Subsec. 3, sec. 334, Criminal Code.) *Mork* v. *Commonwealth*, 6 Bush, 397.

28. It is incumbent on the seller of liquor to know that his customer labors under no disability. *Ulrich* v. *Commonwealth*, 6 Bush, 400.

29. An indictment for grand larceny was indorsed on its back, and described in the order of court filing it, as an indictment for sheep-stealing. Held good. *Commonwealth* v. *English*, 6 Bush, 431.

30. To authorize a conviction of the offense charged, it was incumbent on the Commonwealth to prove that the treasury notes were taken in Messmore's presence, by putting him in fear. *Glass* v. *Commonwealth*, 6 Bush, 436. The rule of reasonable doubt applies to the guilt or innocence of the defendant, and not as to the description of the treasury notes. *Same*, 436.

31. Where the words of the statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense on the defendant. *Commonwealth* v. *Tanner*, 5 Bush, 316.

32. Charging that the defendant was the owner, occupier, and controller of a house and ten-pin alley at which games were played, money and other things bet, and won and lost, by his permission, and he and others played at such games, and money and other things were lost and won thereon, is sufficient. *Commonwealth* v. *Fraize*, 5 Bush, 325.

33. Keeper of a billiard table may be indicted for letting a minor play thereon, either by betting or not. *Green* v. *Commonwealth*, 5 Bush, 327.

34. Accused was indicted for killing Barbara Kriel; her real name was Margaret Kriel. No objection made to the misnomer in the court below. Too late to make it in the court of appeals. *Kriel* v. *Commonwealth*, 5 Bush, 362.

35. A person has a right to keep a tavern, under the Revised Statutes, without license, unless liquor is retailed therein. *Braswell* v. *Commonwealth*, 5 Bush, 544.

36. The commission of a felony is the best evidence of an intent to commit it, and the indictment omitting to allege that the defendant burglariously broke and entered, is cured, after verdict, by subsec. 3, sec. 128, Criminal Code. *Olive* (*alias Alice*) v. *Commonwealth*, 5 Bush, 376.

37. Charging that a game of chance called "pigeon-hole," played for greenbacks in defendant's house, imports a violation of law. *Commonwealth* v. *Branham*, 3 Bush, 1.

38. Striking with intent to kill, is a misdemeanor. *Rice, &c.* v. *Commonwealth*, 3 Bush, 14.

39. The wounding contemplated by sec. 2, act. 6, chap. 28, 1 Stanton's Rev. Stat., 382, is such as would make a homicide murder. If the wounding is inflicted under such circumstances as would make the killing manslaughter only, it is a misdemeanor. As sudden heat and passion, produced by mere words, would not mitigate a homicide to manslaughter, it will not reduce a wounding with intent to kill to a misdemeaner only. *Wilson* v. *Commonwealth*, 3 Bush 105.

40. On an indictment for receiving a bribe for his vote, more than one witness will be required—unless the one witness is sustained by strong corroborating circumstances. *Russell* v. *Commonwealth*, 3 Bush, 469.

41. Defendant with force and arms, feloniously did assault, beat, and shake, and hold, and restrain Susan L. Rogers, with his hands and arms, and with a large knife and weapon, putting her in great fear, etc., with the felonious intent to rob her, etc., *held* sufficient under the statute. (Sec. 2, art. 5, chap. 28, Rev. Stat., 1 Stanton, 381; Crim. Code, sec. 137.) *Taylor* v. *Commonwealth*, 3 Bush, 508.

42. Charging an assault with intent to rob is good. *Dickerson* v. *Commonwealth*, 2 Bush, 1.

43. It is not charged that the billiard table was kept or used by the defendant for hire or profit; and the indictment is not good. *Holt* v. *Commonwealth*, 2 Bush, 33.

44. A conviction for stealing *Stephen* Daniel's hog, upon proof that defendant stole *Philip* Daniel's hog, erroneous. *Hensley* v. *Commonwealth*, 1 Bush, 11.

45. Taking slaves from their owner in Harrison county, Ky., and removing them, whereby they were lost to their owner, by the provost marshal of said county, under orders from the district provost marshal, was indictable under sec. 7, art. 25, chap. 28, Rev. Stat., 411. *Jones* v. *Commonwealth*, 1 Bush, 34. The indictment was found at May term, 1865; and averred that the offense was committed in July, 1865, but said it was before the finding of the indictment; *held* good. *Same*, 34.

46. No one jointly indicted with another is a competent witness for the latter, even on a separate trial, until the witness is discharged from the indictment. See 232, Crim Code. *Chandler* v. *Commonwealth*, 1 Bush, 41.

47. To constitute a principal in the second degree, there must be 1st. A participation in the act committed; 2d. Presence, either actual or constructive, at the time of its commission. *Plummer* v. *Commonwealth*, 1 Bush, 76.

48. Continuing a nuisance up to the day before the finding of the indictment, is sufficient to authorize the Court to order the defendant to abate it by a given day; and, if he fails, to order the sheriff to abate it. *Ashbrook* v. *Commonwealth*, 1 Bush, 139.

INDORSEMENTS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

INFANTS AND INFANCY.

1. See ESTOPPEL AND PURCHASER.

2. Where an infant's right of action accrues against creditors of her deceased guardian, who have by proceedings in court divided his insolvent estate among themselves, without providing for the balance due the ward. *Roberts and wife* v. *Phillips, &c.*, 11 Bush (March 5, 1875).

3. Infants may, at any time within the period prescribed by sec. 421, Civil Code, apply to a court of equity to vacate any judgment by which injustice has been done them. *Allen, &c.* v. *Troutman's heirs*, 10 Bush, 61.

4. They need only allege that they were infants, that it is unjust according to the facts, and that they apply for relief within the prescribed time. (Newland v. Gentry, 18 B. Mon., 670.) *Allen, &c.* v. *Troutman's heirs*, 10 Bush, 61.

5. That the action was not brought within a year after one of the infants arrived at age, is no bar to the rights of the others who sued within the prescribed time. *Allen, &c.* v. *Troutman's heirs*, 10 Bush, 61.

6. The court rendering judgment may, after the expiration of the term, vacate or modify such judgment, by granting a new trial—where there have been erroneous proceedings against an infant, etc., and where the condition of the defendant does not appear in the record, nor the error in the proceeding. (Subsec. 5, sec. 579, Civil Code.) *Richards, guardian, &c.* v. *Richards' adm'r, &c.*, 10 Bush, 617.

7. But where the infancy of the defendant and the error in the proceeding do not appear in the record, the court may vacate—if the infant appear and show cause within one year after becoming of age. (Subsec. 8, sec. 579, and sec. 421, Civil Code.) *Richards, guardian, &c.* v. *Richards' adm'r, &c.*, 10 Bush, 617.

8. Where any irregularity appears of record, remedy may be had by appeal; but an infant may waive mere irregularities and proceed at once to have the judgment vacated on the merits. The *onus* is on the infant, to show the judgment unauthorized. *Richards, guardian, &c.* v. *Richards' adm'r, &c.*, 10 Bush, 617.

9. To obtain relief under subsec. 8 of sec. 579, the infants must show that actual injustice has been done them. (18 B. Mon., 670.) *Richards, guardian* v. *&c. Richards' adm'r, &c.*, 10 Bush, 617.

10. Three infant heirs, on coming of age, were allowed to avoid the conveyance or deed to real estate of a co-heir, recently deceased—on the ground of her infancy at the time of joining in the deed—and to recover the share of the deceased infant. *Burton*, v. *Little, &c.*, 9 Bush, 307.

11. A plaintiff who has made out a good cause of action against non-resident infant defendants, should not have his petition dismissed absolutely or without prejudice, because he submits his cause for hearing before a guardian *ad litem* has been appointed for the infant defendants. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

12. An action should not be dismissed, with or without prejudice, because the plaintiff neglects or fails to have a guardian *ad litem* appointed to defend for infant defendants. *Ibid.*

13. It is the duty of the court to appoint guardians *ad litem* to defend for infants, whether the plaintiff does or does not apply. *Ibid.*

14. If an action be submitted for hearing, before the appointment of a guardian *ad litem*, the court ought to set the hearing aside, appoint a guardian *ad litem*, and defer the hearing until after defense by such guardian. *Ibid.*

15. Infant defendants constructively summoned are parties before the court. *Ibid.*

16. Where the court below erroneously dismissed plaintiff's action, when no guardian *ad litem* had been appointed to defend for infant defendants, the court of appeals will reverse such erroneous judgment, etc., and remand the case with instructions to appoint guardian *ad litem*, etc. But on second hearing, the court below will be bound by the opinion of the court of appeals only to the extent that it may apply, after defense has been made for the infant defendants by their guardian. *Ibid.*

17. Non-resident infant defendants must be defended by a guardian. Sec. 55, Civil Code, "applies as well to infants proceeded against upon constructive service, as to those actually served with summons." The plaintiff can not proceed with his case to judgment until a guardian *ad litem* has been appointed, and has made defense for the infant defendants. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

18. An infant *feme covert* is estopped by a fraud committed on an innocent person. *Schmitheimer and wife* v. *Eiseman*, 7 Bush, 298.

19. Ratification of a contract made during infancy must be direct and express, and must be made with deliberate purpose of assuming a liability from which he knows he is discharged by

law; but where he continues in possession of the property, and asserts ownership, and refuses to re-deliver the same, may raise an implication to pay for the same. *Petty* v. *Roberts*, 7 Bush, 410.

20. Where the infant has been guilty of fraud or deceit, the universal rule is that he must restore the property before he can be relieved of the contract. Otherwise, where the vendor procures the contract to be made, the infant is not guilty of fraud. In such case, if he has wasted the property or destroyed it, he can avoid it without restoring it. *Same*, 410.

21. But to avoid an executed contract, he must restore the consideration received by him. *Same*, 410.

22. Infancy is an available defense in an action to enforce a joint liability against one as a secret partner, for goods purchased ostensibly by his co-defendant on the false representations of the infant as to the solvency of his co-defendant in order that they might both profit by obtaining the goods. This action did not seek to avoid the sale and reclaim the goods, nor to recover on the ground of fraud. *Vinsen* v. *Lockard & Ireland*, 7 Bush, 458.

23. He cannot avoid the contract on account of infancy, unless he relies upon it as a ground of avoidance by pleading it, and tendering to the defendant restitution of that which he received under the contract. *Bryant, &c.* v. *Pottinger, &c.*, 6 Bush, 473.

24. Contracts not equal and beneficial to an infant, are constructively fraudulent; but this may be repelled by proof. In this case, he could not avoid the contract for the land: 1. Because, after majority, he put it out of his power to restore the title; 2. Because he confirmed the purchase. A voidable purchase of property by him may be confirmed by acts that would not confirm a sale, and *e converso*. Less is required to confirm an executed than an executory contract by an infant. Proof showed that the corn he purchased was worth $1,200 when he paid $2,000. He received properly $800, with interest from date of payment. *Middleton, &c.* v. *Hoge, &c.*, 5 Bush, 478.

INFANT'S REAL ESTATE.

1. Land held for life, with remainder over, may be sold for reinvestment, by statute. *Ewing* v. *Riddle, &c.*, 8 Bush, 568.

2. Jurisdiction to decree sale of houses and lots, under sec. 543, is not controlled by sec. 97 of the Civil Code. *Girty & Frame* v. *Logan, &c.*, 6 Bush, 8.

3. Payment to successor of first guardian by appointment of the county court, for land sold previously under order of circuit court, is good; but payment to the administrator of the infant's ancestor is not sanctioned. *Herndon, &c.* v. *Lancaster's adm'rs, &c.*, 6 Bush, 483. But the purchaser should not pay till the court directs the collection and receipt of the funds. *Same*, 483.

4. Because the commissioners' report was not such as the statute required to give the court jurisdiction, the judgment and sale void. Commissioners failed to report the value of the infants' interest in the dower. *Campbell, &c.* v. *Clay, &c.*, 6 Bush, 498. They should report that the interest of the infants required a sale. *Same*, 498. Defective proceedings may be cured by proper proceedings. See acts of Sept. 30, 1861, and March 1, 1862 (Myers' Sup., 424, 425).

5. Judgments against infants constructively summoned not void, and are valid until reversed or set aside. *Simmons, &c.* v. *McKay, &c.*, 5 Bush, 25.

6. In proceeding of adult heirs, part of whom were married women, against infant co-heirs, for partition, with prayer for sale if any portion could not be divided: Commissioners report division of one tract, and that the other tract and town lots could not be divided without great injury. Court had no power to adjudge sale without appointing some one to take care of interest of infants, and privy examination of the married women or bonds by husbands, as required by chap. 86, Rev. Stat. *Horsfall, &c.* v. *Ford, &c.*, 5 Bush, 642.

7. Defective proceedings may be cured, in the Louisville chancery court, by act of Feb. 26, 1868; and when cured, the purchaser should be required to pay purchase money. *Marshall* v. *Marshall*, 4 Bush, 248. Public guardian should take control of suits he finds pending, in the absence of a statutory guardian. *Same*, 248.

8. In a petition to sell the lands of heirs, one of whom is an infant, etc., it is necessary to allege and prove that the share of each heir is not of greater value than $100, under art. 1, chap. 86, Rev. Stat. *Gardner and wife* v. *Craddock, &c.*, 4 Bush, 370.

9. The act of Jan. 12, 1866 (Myers' Sup., 750), to amend articles 3 and 5 of Revised Statutes, chap. 86, has a retroactive and prospective operation. The court should permit guardian, under said act, to amend pleadings and proceedings to cure the defects. *Mahoney, guardian* v. *McGee*, 4 Bush, 527; *Boyce and wife* v. *Sinclair*, 3 Bush, 264.

10. Proceedings, under the act of Feb. 16, 1858, to amend chap. 86, Rev. Stat., to sell and reinvest land held for life with remainder to children, are the same whether the remaindermen are infants or adults; and when the sale is made for the purpose of reinvesting, and not to be placed in the hands of guardian, the reasons and requirements of art. 3, chap. 86, Rev. Stat., cease. *Paul* v. *Paul and wife*, 3 Bush, 483.

INJUNCTIONS.

1. See BONDS—STATUTORY, &c. (9 Bush, 699.)

2. It is not impracticable to have the legal questions involved settled by a court of law. If otherwise, or if necessary to prevent a multiplicity of suits, or if appellants had established at law their right to disregard the town ordinance as an illegal and unauthorized exercise of municipal power, or to be exempted from its operations because of the private act passed by the legislature for their benefit—then equity might interfere by injunction against the town. *Brown, &c.* v. *Trustees of Catlettsburg*, 11 Bush (Oct. 16, 1875).

3. Injunction to stay proceedings on a judgment must issue from the court where judgment was entered. Sec. 314, Civil Code, applies to justices' courts. *Davis* v. *Davis*, 10 Bush, 274.

4. The collection of a judgment rendered in a justices' court may be enjoined by that court, although, with interest and costs, it exceed fifty dollars. *Davis* v. *Davis*, 10 Bush, 274.

5. Injunction from one circuit court interposes no legal obstacle to the enforcement of a mandamus issued by the circuit

court of another county. *Cumberland & Ohio R. R.* v. *Judge of Washington County Court*, 10 Bush, 564.

6. Any tax-payer of a precinct has the right, by legal proceedings, to restrain the sale of the bonds of the precinct, illegally issued to aid in the construction of a railway. *Allison, &c.* v. *Louisville, Harrod's Creek and Westport Railway Co.*, 9 Bush, 247.

7. A petition on an injunction bond, conditioned to pay the judgment enjoined in the event the injunction is dissolved, is insufficient unless it states that the judgment is unpaid. *Crawford* v. *Woodworth*, 9 Bush, 745.

8. Special damages can not be recovered on an injunction bond, unless assessed by the court upon the dissolution of the injunction. *Ibid.*

9. An allegation "that the petition was dismissed, and defendants recovered judgment for their costs in the sum of ten dollars," should be construed to mean the costs of the action in which the injunction issued, and not the costs necessarily resulting from the injunction. *Ibid.*

10. Injunction not proper to correct errors which might be corrected on appeal. Misprision of clerk no ground for injunction and for defenses not discovered. After the judgment, no injunction should be granted. *McCown* v. *Macklin's ex'r*, 7 Bush, 308.

11. In all cases of a mere injunction of a judgment, the ordinary injunction bond affords all the security required by law. *Fellows & Co.* v. *Day*, 5 Bush, 666.

12. Judgment for damages on dissolution of injunction is a final order. *Offutt's ex'x* v. *Bradford, &c.*, 4 Bush, 413.

13. Chancellor can enjoin from cutting timber, or intruding on land claimed by each party. *Peak, &c.* v. *Hayden, &c.*, 3 Bush, 125.

14. Judgment for fourteen dollars, ten per cent. damages, when ten per cent. on the amount enjoined amounted to less than seven dollars: Judgment reversed. *Moss* v. *Rowland, &c.*, 3 Bush, 505.

15. The mandate of the court of appeals must be entered, before the chancellor can suspend it for good cause. *Watson, &c.* v. *Avery, &c.*, 3 Bush, 635.

16. Chancellor can enjoin from the commission of trespasses and injuries to private property, in order to prevent oppressive litigation. *Musselman* v. *Marquis*, 1 Bush, 463.

INNOCENT PURCHASERS.

1. See CONTRACTS; and VENDORS AND VENDEES.

2. Where a special warranty of title is exacted by the grantee under such circumstances as imply knowledge that the property was held in trust, the grantee is not an innocent purchaser, entitled to hold against the beneficiary of the grantor. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

3. When the grantee has knowledge that the grantor was a director in the corporation at the time he became the purchaser of the railroad, etc., belonging to the corporation, at a judicial sale thereof, such grantee is put upon inquiry as to the character of the title to the road, etc., thus acquired by such director. The grantees in this case are not innocent purchasers. *Ibid.*

INSANITY.

See CRIMINAL LAW AND PROCEEDINGS; and IDIOTS AND LUNATICS.

INSOLVENCY.

What is insolvency, discussed. *Thompson, &c.* v. *Heffner's ex'r's, &c.*, 11 Bush (Oct. 1, 1875).

INSOLVENT DEBTOR'S ESTATE.

1. A mortgage of a portion of his estate by an insolvent will be respected by courts of equity, except when attacked under the provisions of the act of 1856. *German Security Bank, &c.*, v. *Jefferson, &c.*, 10 Bush, 326.

2. In the settlement of an insolvent's estate the chancellor will not marshal the securities to the prejudice of a creditor holding a security obtained by contract. (Logan v. Anderson, 18 B. Mon., 119.) *German Security Bank, &c.* v. *Jefferson, &c.*, 10 Bush, 326.

3. The charter lien of a bank on the stock of its debtor, being created by law, is only entitled to a preference similar to that of

partnership over individual creditors. *German Security Bank, &c.* v. *Jefferson, &c.*, 10 Bush, 326.

4. The bank, having applied the whole of the debtor's stock to payment of its debt, will be postponed until the general creditors have been made equal out of the general estate, and will share the residue *pro rata* with all the creditors. *German Security Bank, &c.* v. *Jefferson, &c.*, 10 Bush, 326.

INSTRUCTIONS.

1. See NEW TRIAL (9 Bush, 738); CRIMINAL LAW AND PROCEEDINGS; and INSTRUCTIONS IN CRIMINAL CASES.

2. Facts assumed in an instruction must be sustained by the evidence. *Murphy* v. *May, &c.*, 9 Bush, 33.

3. Erroneous instructions are not prejudicial to the plaintiff, when his own testimony fails to show a good cause of action. *Sullivan's adm'r* v. *Louisville Bridge Co.*, 9 Bush, 81.

4. In an action to recover for causing death by negligence, it is error to instruct the jury that, upon proof of simple negligence, they may give "such damages as they may deem just and proper by way of compensation, not exceeding the amount claimed in the petition. *Louisville, Cincinnati and Lexington R. R. Co.* v. *Case's adm'r*, 9 Bush, 728.

INSTRUCTIONS IN CRIMINAL CASES.

1. See CRIMINAL LAW AND PROCEEDINGS; and NEW TRIAL.

2. It was error to assume in the instruction that a knife used was a dangerous weapon, and that it was kept concealed—as these were facts for the jury. *Berry* v. *Commonwealth*, 10 Bush, 15.

3. Instructions should be identified in the record. *Weatherford* v. *Commonwealth*, 10 Bush, 196.

4. Instructions ought to be based upon such facts only, as must be found by the jury in order to establish the guilt or innocence of the accused. *Coffman* v. *Commonwealth*, 10 Bush, 495.

5. An instruction which assumes as a fact that the defendant used the instrument with which he was charged with having

slain the deceased in a manner calculated to produce death, is objectionable. *Leiber* v. *Commonwealth*, 9 Bush, 14.

6. Instructions should not be too numerous and prolix for a perspicuous presentation of the law of the case. *Leiber* v. *Commonwealth*, 9 Bush, 14.

7. Prominent facts should not be grouped together in an instruction. *Williams* v. *Commonwealth*, 9 Bush, 274.

8. "That if the jury shall believe from the evidence that Smaltz, the prisoner, did actually believe and had reasonable grounds for believing that, at the time of the shooting, his life was in danger, or that his person was in danger of great bodily harm by the hands of McDonald, and that the same was then imminent, that he had the right to use any means then in his power necessary to avert the impending danger, and if he shot McDonald then—reasonably feeling that he was in imminent danger, and that the shooting was necessary to his defense—that he is justifiable in the shooting, the same being self-defense, and they must acquit him." *Held* to be right. *Smaltz* v. *Commonwealth*, 3 Bush, 32.

9. "If the jury find from the evidence, beyond a reasonable doubt, that in January, 1867, in the corporate limits of Owenton, &c., the prisoner, intentionally, wantonly, and carelessly fired off and discharged a loaded pistol, loaded with powder and ball or other hard substance, and this within, &c., and upon one of the public streets of said town, such discharging of said pistol and shot killed George Wood, in so discharging his pistol, such killing is manslaughter, whether the prisoner at the time he fired the pistol had or had not an intention to kill the said Wood or any other person." *Held* good. *Sparks* v. *Commonwealth*, 3 Bush, 111.

10. If Sparks intentionally and in a wanton and careless and reckless manner fired off and discharged his pistol, and thereby shot and killed Wood, such killing is manslaughter. *Same*, 111.

11. If, in executing an unlawful purpose, the pistol should accidentally and prematurely go off, the accused would be criminally as liable as if he had deliberately shot it. *Same*, 111.

12. "That if they have a reasonable doubt of the truth of any fact, any series of facts, or *propositions* necessary and essen-

tial in their judgments to the conclusion of guilt, the prisoner is entitled to the benefit of that doubt, and they must acquit him." Ought not to be given. *Same*, 111.

13. The superfluous words, "and did not believe," in an instruction, made it more favorable to the defendant for carrying concealed weapons than he had a right to demand. *Hopkins* v. *Commonwealth*, 3 Bush, 480.

14. For the sole purpose of showing that the witness had contradicted himself, a paper—subscribed by him, giving an account of his statement at the examining trial—was offered, and the court orally remarked that "the defendant's attorney had let down the fence, and that all is now before the jury," was misleading. The paper was competent for the purpose avowed, but not of the truth of the facts recited. *Coppage* v. *Commonwealth*, 3 Bush, 532.

The case of *Curry* v. *Commonwealth*, 2 Bush, 67, is overruled by the case of *Shannahan* v. *Commonwealth*, 8 Bush, 463. Also the cases of *Smith* v. *Commonwealth*, 1 Duvall, 224, and *Blimm* v. *Commonwealth*, 7 Bush, 320, are overruled by said case in 8 Bush, 463.

15. An instruction is misleading and erroneous, which was liable to be understood by the jury as authorizing them to convict the prisoners, merely on being satisfied that they were present and acquiesced in the homicide, without aiding or abetting in its perpetration, or having any participation in the deed; and the evidence going to explain the flight and concealment of the defendants, on the ground that they were occasioned by an apprehension of violence or otherwise, was competent. *Plummer* v. *Commonwealth*, 1 Bush, 76.

INSURANCE.

1. A man, being insolvent then, and to the day of his death in 1872, insured his life in 1868 and in Jan. 1870, for the benefit of his wife. A small part of the premiums were paid by his wife, and no intent to defraud creditors was shown. *Held*—that under the act of March 12, 1870, the insurance-money could not be subjected to the payment of his debts. The court

doubtingly directed the premiums paid prior to that date, with interest, to be accounted for by the wife. *Thompson* v. *Cundiff, &c.*, 11 Bush (Dec. 3, 1875).

2. Premiums paid by the husband, on a policy of insurance on his own life, for the benefit of his wife, in the Ky. Southern Mutual Co., are protected by its charter. *Ibid.*

3. Under the act of March 12, 1870 (Acts 1869–'70, pp. 71–2), a husband has the right to insure his life for the benefit of his wife—provided that if the premium thereon be paid with intent to defraud his creditors, an amount equal to such premium and interest thereon shall be held liable to the payment of debts not barred by limitation. *Ibid.*

4. Each yearly payment of premiums on a policy of life insurance is, in a limited sense, the making of a new contract; and is protected by the act of March 12, 1870 (Acts 1869–'70, pp. 71–2). (St. Louis Mutual Life Ins. Co. v. Grigsby, 10 Bush, 310.) *Ibid.*

5. "If the said insured shall fail to pay annually in advance the interest on any unpaid notes or loans, which may be owing . . . . on account of any of the above mentioned premiums." This is held to mean that the contemplated "loans" were to be made up of the "annual premiums." The interest on such loans is in no sense a premium, and the policy cannot be forfeited for its non-payment. *St. Louis Mutual Life Ins. Co.* v. *Grigsby*, 10 Bush, 310.

6. Conditions in life-insurance policies providing for forfeitures are upheld and enforced, and are not regarded as penalties. Time is of the essence of such contracts; and they are to be kept in force, from year to year, at the will of the insured. *Ibid.*

7. The policy is forfeited by a failure to pay a note given for the premium. *Ibid.*

8. A forfeited policy of life-insurance for ten thousand dollars was "renewed and continued in force for the commuted amount of three thousand dollars until the 16th day of August, 1871." *Held*—that this limitation as to time was unavailing, since, by the terms of the original policy, which, by the acceptance of interest in arrears, was reinstated for the commuted amount, it was to continue in force during the life of the insured. Being commuted, it became essentially a paid-up policy, except that

the company might demand payment of the note given for premiums. *Ibid.*

9. The insurance act of March 12, 1870, does not apply to the Louisville German Mutual Fire Insurance Company or the Louisville German Washington Mutual Fire Insurance Company. *Louisville German Mutual Fire Insurance Association* v. *Commonwealth*, 9 Bush, 394.

10. These insurance companies were organized before 1870, without capital stock and without premium notes, etc., and are not stock or mutual companies within the meaning of the act of March 12, 1870, and their charters are not repealed by said act. *Ibid.*

11. A general agent of an insurance company has a right to waive the payment of premiums in money, and in lieu thereof take a promissory note, or undertake to make the payment himself, notwithstanding a recital in the policy that it shall not be binding until the cash part of the first premium is actually paid in money. *Mississippi Valley Life Ins. Co.* v. *Neyland*, 9 Bush, 430.

12. A local agent, authorized to deliver "binding receipts" signed by the general agent, agreed, in good faith and for value, to assume himself the payment to the company of the first cash installment, and delivered to the insured a "binding receipt," properly signed. *Held*—that the company was bound. *Ibid.*

13. A pamphlet containing the private instructions of a company to its agents is not evidence in its behalf; nor is a letter from one of its agents to another. *Ibid.*

14. Where the policy stipulated that it should be void in case the assured should "become so far intemperate as to impair his health, or induce *delirium tremens*," and required notice and proof of his death, notice and proof of the death were not defective, because of the statement therein that after the insurance and before his death he suffered with *delirium tremens* from drink. *Connecticut Mutual Life Ins. Co.* v. *Siegel, &c.*, 9 Bush, 450.

15. When an apparent ground of defense is disclosed by a separate and unnecessary narration of circumstances, and the proofs required by the policy are complete without that narration and disclosure, it can not be said that the party has failed

to comply with the condition imposed upon his right to litigate his claim. *Ibid.*

16. The contract of a foreign insurance company (which has not complied with the Kentucky statute) is void, and no recovery can be had thereon. *Franklin Ins. Co.* v. *Louisville & Arkansas Packet Co.*, 9 Bush, 590.

17. The act of March 12, 1870, concerning foreign insurance companies, is not a mere revenue measure, but is intended to prohibit the business itself, so far as carried on in violation of the act. *Ibid.*

18. The foregoing rule applies where the policies were delivered and the premium notes taken in this State, by a person compensated by the foreign company therefor. *Ibid.*

19. "If there is or shall hereafter be made any further insurance on the property hereby insured, without being notified to this company, and its consent thereto written hereon, then and in that case this policy shall be of no binding force on this company." The same general agent of the United Life, Fire, and Marine Ins. Co. and the Kenton Ins. Co. obtained issued policies of insurance to Shea & O'Connell on the same goods. Formal notice was not given to the first insurer. Knowledge of the agent was notice to the company; and it had the election, after violation of the contract, to cancel the policy by returning a proper proportion of the premium, or retain it and permit the policy to remain in force. The first company, from the moment its agent issued the Kenton Ins. Co. policy, waived the right to exoneration. *Von Bories, &c.* v. *The United Life, Fire, and Marine Ins. Co.*, 8 Bush, 133; *Kenton Ins. Co.* v. *Shea & O'Connell*, 6 Bush, 174.

20. An insolvent debtor, by the use of his own means, obtained insurance policies upon his life for the benefit of his wife. It is fraudulent as to antecedent creditors. He may insure his life so far as will be sufficient to enable his wife, in the event of his death, by prudence and economy, to support his family, and to afford them an opportunity to secure an education. *Stokes & Son* v. *Coffey, &c.*, 8 Bush, 533.

21. Liens on insured property retained in unrecorded policies, not good against *bona fide* purchasers. *Kentucky Farmers' Mutual Ins. Co.* v. *Mathers, &c.*, 7 Bush, 23. Policy declaring

it to be void on alienation of the property insured, means to be void where the right of exoneration is not waived by the insurer. *Same*, 23; 4 Bush, 242.

22. Retrospective insurance, made when the thing insured is distant and its status unknown to either party, will bind the insurer for loss of property before the date of insurance. *Security Fire Ins. Co. of N. Y.* v. *The Kentucky Marine and Fire Ins. Co.*, 7 Bush, 81. Parol contract to insure, or to issue a policy, is binding, without any written memorial. *Same*, 81. That all policies shall be signed by the president and attested by the secretary, only refers to executed policies, and does not change the common law in respect to executory contracts of insurance, or for policies; and on such an executory agreement, the chancellor will adjudge damages for the loss, as though an action had been brought on the policy for the loss of the thing insured. *Same*, 81.

23. C., of Va., insured his life in a New York Co. for $5,000, for the benefit of his wife and children. He paid all the premiums before March 13, 1862, but did not pay for 1862–'63–'64. For non-payment of any of the premiums, the policy contained a provision that "the company should not be liable to the payment of the sum insured, or any part thereof;" the premium for March 13, 1862, was tendered to the agent, but refused by him. He took a bond for its payment at the end of the war. The wife and children were entitled to recover the $5,000, less the unpaid premiums. *New York Ins. Co.* v. *Clopton, &c.*, 7 Bush, 179. The war did not avoid the pre-existing contract which a single act might perform. The remedy was suspended until peace was restored. *Same*, 179.

24. Contracts of insurance, if not enforceable in the State where made, will not be enforced in another State; and the execution will be completed when the last act is to be done. In this case, the agent having failed to comply with the law of Indiana where the premium notes were received, they cannot be enforced in Kentucky. *Ford* v. *Buckeye State Ins. Co.*, 6 Bush, 133.

25. The written application must be considered a part of the policy. The insured falsely affirmed that his title was exclusive and unencumbered, and that no other person had an interest

therein. These false representations, supported by the preliminary oath of the insured, avoided his policy. *Security Ins. Co.* v. *Bronger, &c.*, 6 Bush, 146.

26. "If he shall die by his own hand, this policy shall be void." To avoid the policy, the act of self-destruction must be voluntary; and if the party is laboring under either mental or moral insanity when he commits the deed, the insurance company will not be exonerated; and this matter should be submitted to the jury. *St. Louis Mutual Life Ins. Co.* v. *Graves*, 6 Bush, 268.

27. K. made an agreement that the policy should not be binding on the company, until the premium stated should be paid in the lifetime and good health of K. The policy was signed and sent to the agent of the company after K. was taken sick. The cash premium was never tendered nor paid. *Held* not to be binding on the company. *St. Louis Mutual Life Ins. Co.* v. *Kennedy, &c.*, 6 Bush, 450.

28. Insurance company is liable for goods stolen to avoid impending loss by fire from an adjoining building, although the policy contains this stipulation—"that this company will not be liable for any loss or damage to goods contained in the show windows when the loss or damage is caused by the light in the window; nor shall the company be liable for loss by theft. *Leiber* v. *Liverpoool, London, and Globe Ins. Co.*, 6 Bush, 639.

29. Z. & S. owned a malt-house. S. sold his interest to Z. for $10,000, and Z. agreed to insure the property for that sum for the benefit of S. He obtained a policy in the German Ins. Co. and from the defendant. S. afterwards enforced his lien, and the sale was confirmed in Oct., 1867. The property was burned 5th of August, previously. 1. The preliminary evidence was dispensed with, by conduct of defendant's agent; 2. The policy was equitably assignable; but the interest of Z. was not effectually changed until after the fire, and the provision as follows was not violated, viz: "If said property shall be sold or conveyed, or the interest of the parties therein changed, this policy shall be null and void." 3. But the policy was made void by a failure to notify the agent of the insurance by the German Ins. Co. policy, and have it indorsed on the appellant's policy. This should have been done, whether the policies were issued simultaneously

or at different times. *Manhattan Ins. Co.* v. *Steim & Zang*, 5 Bush, 652.

30. Procuring another insurance on the same property, without having it indorsed on the first policy, avoids it, at the option of the insurer. "Void" means voidable, or may be treated as void by the insurer, at his option; and his assent to the appraisement, after the loss, does not imply a waiver of the forfeiture. *Baer* v. *Phœnix Ins. Co.*, 4 Bush, 242.

31. Insurance company responsible for injury to eight mules prudently stationed on a steamboat, by an escape of steam on the boat from an unknown cause, without the fault of the officers of the boat. This injury was caused by one of the perils of the river insured against. *Union Ins. Co.* of Louisville v. *Groom*, 4 Bush, 289.

32. The assured put his hand inadvertently out of the window of the railroad car, and had it badly injured. The injury was produced by his own fault, and he could not recover therefor. *Morel* v. *Mississippi Valley Life Ins. Co.*, 4 Bush, 535.

33. Although the assured has not taken preliminary steps to prove his loss, his attaching creditors may do so, and the deposition taken in the case may be taken as preliminary proof mentioned in the policy. *Northwestern Ins. Co.* v. *Atkins*, 3 Bush, 328. Assured must substantially comply with the conditions set forth in his policy, before a right of action for loss accrues, unless the preliminary proof be waived. The party must furnish the best evidence of the fact which he possesses. The requirements do not have to be complied with, with technical strictness. *Same*, 328.

INTEREST.

1. See SINKING FUND (9 Bush, 708).

2. In an action upon an unliquidated account—unless interest, or damages in lieu of interest, are claimed as having accrued thereon—no judgment will be rendered for either. The presumption of law is that the claim was not theretofore bearing interest. *Adams Express Co.* v. *Milton*, 11 Bush (March 19, 1875).

3. On such demands, interest is sometimes allowed by way of damages in cases where the debtor is justly chargeable with delinquency; but never when the delay is the result of the mere failure of the creditor to press the collection of his claim. *Adams Express Co.* v. *Milton*, 11 Bush (March 19, 1875).

4. The compounding of interest, in the settlement of guardian's accounts, should cease as to each ward at the time the ward arrives at full age. (Clay v. Clay, 3 Metcalfe, 554.) *Tanner, &c.* v. *Skinner, &c.*, 11 Bush (April 13, 1875).

5. Excess of interest paid, how applied. *Smith* v. *Young, &c.*, 11 Bush (Oct. 13. 1875).

6. A defaulting collector is liable for the principal and ten per cent interest, from the first day of June preceding the time when the money ought to have been paid into the treasury. (Sec. 6, art. 11, chap. 92, Gen. Stat.) *Samuels, &c.* v. *Commonwealth*, 10 Bush, 491.

7. Interest, on money held and used by the executor for his own purposes during a protracted litigation, was properly charged against him, although there was no order of court directing him to loan out the fund. *Grigsby's ex'r* v. *Wilkinson, &c.*, 9 Bush, 91.

8. The executor is also charged with interest on a fund belonging to a lunatic, which he held, and took no steps to have it applied for her benefit. *Ibid.*

9. Profits and interest accruing from the investment and use of trust-fund belong to the beneficiary of the trust, unless otherwise disposed of. *Young and wife* v. *Smith, &c.*, 9 Bush, 421.

10. Time for redeeming land sold under execution being extended beyond one year by the purchaser, he is entitled to ten per cent. interest per annum for one year only; and after adding principal and interest, the aggregate should be calculated at six per cent. per annum thereafter. *Williams* v. *Williams*, 8 Bush, 241.

11. The note was given, to be binding and due when $75,000 should be obtained, in cash or promissory notes given for that purpose; and it shall be paid at my death. Interest to commence running after obligor's death; and payments of interest when none was due applied to principal debt at maturity of obligation. *Carr's ex'r* v. *Robinson & Dudley*, 8 Bush, 269.

12. The several payments should be so applied at their dates as to first discharge the interest which had already accrued on the debt. (1 Mar., 584; 5 Dana, 470.) *Riddle, &c.* v. *Lewis*, 7 Bush, 193.

13. Rent after it is due shall carry interest, like other liabilities originating in contracts (sec. 3, art. 2, chap. 56, Rev. Stat., 2 Stanton, 92.) But this does not apply to suits for recovery of land and damages for detention thereof. *Moore, &c.*, v. *Calvert, &c.*, 6 Bush, 356.

14. Note executed in Missouri to bear interest at ten per cent. per annum from date of the note, which was payable one day after date. Judgment for the debt and 10 per cent. interest per annum until the rendition of the judgment, and six per cent. per annum thereafter. (22 Howard, 118.) *Gray, &c.* v. *Briscoe*, 6 Bush, 687. The conventional rate of interest ceases at maturity, unless otherwise contracted by the parties. *Same*, 687.

15. In August, 1862, A. borrowed legal tender U. S. notes, and agreed to pay their nominal amount in gold, in 1, 2, 3, and 4 years. The difference between the value when loaned of the currency and gold, must be considered an evasion of the usury laws. *Glass* v. *Abbott*, 6 Bush, 622.

16. Decretal orders as well as judgments draw interest from their date. (Sec. 6, chap. 52, Rev. Stat., 2 Stanton, 69.) *Commonwealth for Peters* v. *Bosley, &c.*, 5 Bush, 221.

17. Interest should be allowed on cash advances, as matter of legal damages. *Fields* v. *Burnam, &c.*, 3 Bush, 518.

INTERLINEATIONS IN PLEADINGS.

The evidence preponderates in favor of the conclusion that the interlineations were not incorporated after the filing of the original affidavit. *Smith* v. *Belmont & Nelson Iron Co., &c.*, 11 Bush (Oct. 13, 1875).

JOINT OWNERS.

See PARTIES (9 Bush, 675).

JUDGMENTS.

1. See FOREIGN JUDGMENTS; ASSIGNMENTS; and SET-OFF.

2. A judgment should be so framed as to describe the property sought to be sold. *Kueven, &c.* v. *Specker, &c.*, 11 Bush (March 4, 1875).

3. Where two attachments are levied upon the same interest in an estate, the actions should be consolidated or heard together, a judgment rendered to sell to satisfy both, and but one sale ordered. *Davidson, &c.* v. *Simmons*, 11 Bush (Sep. 25, 1875).

4. It is error to render a judgment to sell the real estate, without subjecting the personal assets, or ascertaining that there are none. (Civil Code, sec. 250.) *Davidson, &c.* v. *Simmons*, 11 Bush (Sept. 25, 1875).

5. A judgment is the highest evidence of indebtedness known to the law; and it would be a legal anomaly, if it should be held to be barred by lapse of time that would not bar an action on a promissory note, or even upon an open account. *Davidson, &c.* v. *Simmons*, 11 Bush (Sept. 25, 1875).

6. The description of land in a judgment, as that "sold by P. and wife to R., the same being an undivided interest held by said defendant E. P. as one of the heirs at law of E. R., and the same situate in F. county and now held by defendant R.," was not sufficient to direct the commissioner in making the sale. *Runyon* v. *Darnall*, 10 Bush, 67.

7. Defendant will be without remedy against a judgment, by default, for an attorney's fee stipulated for in the writing sued on, and set out in a sufficient petition. *Thomasson* v. *Townsend*, 10 Bush, 114.

8. On a joint judgment, the execution must be joint. (Rev. Stat., chap. 36, sec. 3, art. 2, 1 Stanton, 473.) *Tanner* v. *Grant*, 10 Bush, 362.

9. If the court confirms a sale, by its commissioner, of more land than the judgment authorized, it is only voidable, and can not be assailed in a collateral proceeding. (Voorhees v. Bank of United States, 10 Peters, 451; Bustard v. Gates, 4 Dana, 441; Dorsey v. Kendall, 8 Bush, 299.) *Dawson, &c.* v. *Litsey*, 10 Bush, 408.

10. An order confirming a report of a sale is final, and may be appealed from. *Dawson, &c.* v. *Litsey*, 10 Bush, 408.

11. A court having jurisdiction of the parties and of the subject-matter of the action, when rendering a judgment, determines the rights of all the parties to the judgment so long as it remains unreversed. *Dawson, &c.* v. *Litsey*, 10 Bush, 408.

12. A judgment on a motion against an officer without notice can not, if the court had jurisdiction, be treated in a collateral proceeding as void. *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

13. A joint judgment, if void as to one, is void as to all. A several judgment may be reversed as to one, and affirmed as to another. A judgment against a divorced wife for her debt, and also against the husband as to any property received by the marriage, if void as to the husband, can not prejudice the wife, and is not void as to her. (55 Maine, 252; 9 Mass., 532.) *Joyes* v. *Hamilton*, 10 Bush, 544.

14. A court may vacate or modify its judgment, after the expiration of the term, by granting a new trial, where there have been erroneous proceedings against an infant, etc., and the condition of defendant does not appear in the record nor the error in the proceeding. (Subsec. 5, sec. 579, Civil Code.) *Richards, guardian, &c.* v. *Richards' adm'r, &c.*, 10 Bush, 617.

15. A judgment or decree is conclusive as between the parties and privies to it, but never concludes persons who are not parties or privies. *Memphis & St. Louis Packet Co.* v. *Grey*, 9 Bush, 137.

16. None can be considered as parties to a suit who are not named as such in the record. *Ibid.*

17. A judgment of a court of concurrent jurisdiction directly upon the point is, as a plea in bar or as evidence, conclusive between the same parties and upon the same matter directly in question in another court. *Crabb* v. *Larkin, &c.*, 9 Bush, 154.

18. A judgment of court and record in a suit on promissory notes against one party, cannot be read by the plaintiff, as evidence in another action on the same notes, against another defendant, who was not a party to the first suit. *Ibid.*

19. Where a suit is brought to enforce a lien on two tracts of land for the purchase-money, and the decree simply directs the

sale of "the tract of land described in the petition," without any further description, a sale under such decree will be set aside. *Lawless* v. *Barger*, &c., 9 Bush, 665.

20. A decree should be so certain and specific in its directions to the commissioner, as to the property to be sold, as well as to his other duties, as would enable that officer to discharge his duties without reference to any other paper in the cause. *Ibid.*

21. A judgment for a fine is merged by replevying the *capias pro fine* which issued thereon. *Commonwealth* v. *Merrigan*, 8 Bush, 131.

22. The judgment should be in the alternative, in an action to recover personal property. *Rogers* v. *Bradford*, 8 Bush, 163.

23. Motion for new trial suspends judgment until disposed of. (13 B. Mon., 234.) *Louisville Chemical Works* v. *Commonwealth*, 8 Bush, 179.

24. An ordinary judgment can only be annulled or modified for matter of defense which has arisen or been discovered since it was rendered. (7 Bush, 308.) But the defendant may assert any cause of action he may have had against plaintiff, although it might have been used as a set-off or counter-claim to prevent the recovery against him. *Emmerson's adm'r* v. *Herriford*, 8 Bush, 229.

25. Probate or rejection of a will, while the judgment remains in force, is conclusive against all persons; but the judgment of probate of a married woman's will could not of itself give the will effect as to the land which was the general estate of the testatrix. *Mitchell and wife* v. *Holder*, &c., 8 Bush, 362.

26. A judgment, without appearance or service of process, is void. (6 Bush, 394.) *Hall*, &c. v. *Commonwealth*, &c., 8 Bush, 378.

27. Money coerced by a judgment obtained by fraud may be recovered back in equity, without awarding a new trial in the action at law, or setting aside the judgment therein. *Ellis* v. *Kelly*, 8 Bush, 621.

28. Void judgments will be reversed by court of appeals. *Landrum* v. *Farmer*, 7 Bush, 46. And the circuit court has power to adjudge a judgment void, for the purpose of enjoining and vacating proceedings under it. (16 B. Mon., 289; 2 Duvall, 81.) *Same*, 46.

29. Judgment without personal service void, and proceedings and sales under void judgment void. *Roberts* v. *Stowers*, 7 Bush, 295.

30. Judgments of court of appeals void, without service of summons or an appeal granted by lower court. Judgments of a former term cannot be corrected by court, but mistake in recording judgment may be. *Finnell, &c.* v. *Jones' ex'x, &c.*, 7 Bush, 359.

31. Judgment vacating and setting aside former judgment is final, and subject to appeal. *McCall* v. *Hitchcock*, 7 Bush, 615.

32. Judgment of circuit court reversing judgment of county court, and dismissing application for a new road, is a final order from which an appeal may be prosecuted to the court of appeals. *Helm, &c.* v. *Short, &c.*, 7 Bush, 623. A final order puts an end to the action by declaring that the plaintiff has entitled himself, or has *not*, to recover the remedy sued for, terminates the action, decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to put the parties in their original position. (3 Blackstone, 497; 15 B. Mon., 48; 18 B. Mon., 826.) *Helm, &c.* v. *Short, &c.*, 7 Bush, 623.

33. Judgments of competent jurisdiction are binding on all parties, until reversed or vacated. An appeal prosecuted in the name of a dead man, and judgment of reversal rendered, is not void. When judgment is rendered for or against a *feme covert* or a dead man, the error can only be corrected by the court that rendered the judgment. *Spalding, adm'r, &c.* v. *Wathen*, 7 Bush, 659.

34. Process not being served before judgment, is no ground for vacating judgment, under secs. 579, 581, Civil Code. If judgment be rendered prematurely, it is a clerical misprision. *Joyce* v. *O'Toole, &c.*, 6 Bush, 31. (2 Duvall, 540.)

35. Joint judgment proper, where defendants jointly answered and claimed the land for which the judgment was rendered. *Holmes' heirs* v. *Gay's heirs*, 6 Bush, 47.

36. The last of two judgments to sell the same land, being rendered without supplemental proceedings, is void. *Bethel* v. *Bethel*, 6 Bush, 65.

37. Judgment in a criminal case may be arrested, if the facts stated in the indictment do not constitute an offense within the jurisdiction of the court. (Criminal Code, sec. 271.) *Commonwealth* v. *Hadcraft*, 6 Bush, 91.

38. Judgment upon a contract to pay in gold, should be for gold or its value in currency. *Glass* v. *Pullen*, 6 Bush, 346.

39. Judgment against administrator is *prima facie* evidence against heirs, to subject land descended to them. *Hopkins, &c.*, v *Stout*, 6 Bush, 375.

40. Judgment without service void. *Long, &c.* v. *Montgomery*, 6 Bush, 394. Robinson v. Mobley, 1 Bush, 196, on this point overruled. (See 2 Duvall, 540.)

41. Summons indorsed "executed," but not signed, not sufficient; and a recital in the judgment that the summons had been executed is merely formal. *Same*, 394.

42. A substantial defect in indictment, ground for arresting judgment. (Subsec. 3, of sec. 334, Criminal Code.) *Mork* v. *Commonwealth*, 6 Bush, 397.

43. Court cannot enforce lien for installments of purchase money not due. *Burton* v. *McKinney*, 6 Bush, 428.

44. An order reinstating a dismissed action, at same term, is not a final order from which an appeal may be prosecuted. *Curd* v. *Dodds, &c.*, 6 Bush, 681.

45. When the value of property is alleged it must be proved, and judgment cannot be rendered without proof. (3 Met., 196; 2 Bush, 169.) *Beam* v. *Hayden*, 5 Bush, 426.

46. Judgment obtained against a person of unsound mind, subsequently found to be so, may be revived by an action against the defendant and his committee. *McNees and wife* v. *Thompson and committee*, 5 Bush, 686.

47. Judgment is not superseded by giving a bond, without issuing the *supersedeas*. (Civil Code, secs. 886, 887, 888, 892.) *Reed* v. *Lander*, 5 Bush, 598.

48. It is erroneous to adjudge "ten per cent. damages as agreed in the bond herein," without ascertaining the specific sum recovered. *Smith* v. *Wells' adm'r*, 4 Bush, 92.

49. By agreement of parties, the court may allow a former voidable judgment against an infant to be set aside, and retry the case. The action being defeated on the second trial, the

former judgment cannot be enforced. *Ramage* v. *Clements & Gilmore*, 4 Bush, 161.

50. It is a clerical misprision not to mention in the judgment credits shown in the petition. *Long* v. *Gaines, Berry & Co.*, 4 Bush, 353.

51. Judgment on demurrer dismissing plaintiff's petition is final, and may be appealed from. *Commonwealth for Young* v. *Peters, &c.*, 4 Bush, 403.

52. Quashal of a *fi. fa.*, levy and sale of land, because credit was not indorsed on the execution, leaves the judgment in full force; and plaintiff may take out another execution. *Davie* v. *Long's adm'r*, 4 Bush, 574.

53. Erroneous judgment cannot be assailed collaterally. *Green* v. *Ball*, 4 Bush, 586.

54. A sale bond merges a judgment *pro tanto*, and must be enforced by execution on the sale bond. *Hanna, Hart & Co.* v. *Guy, &c.*, 3 Bush, 91.

55. On dismissal of appeal, plaintiff was remitted to his original judgment. *Manier* v. *Lindsay*, 3 Bush, 94; *Olmstead, &c.* v. *Mason, &c.*, 3 Bush, 693.

56. Overruling motion to set aside verdict of the jury, is not a final judgment. *Rucker* v. *Pritchett, &c.*, 3 Bush, 689.

57. Order for part of a judgment is not an assignment of it, but evidence of indebtedness which may be enforced on refusal to accept or pay the order. *Thomas* v. *Porter*, 3 Bush, 177.

58. Taking for confessed a petition for wrongful taking and conversion of property is final; and left only the question of value for litigation. *Kendrick* v. *Fields*, 2 Bush, 153.

59. Judgment for value of a watch and note by default: the judgment recites that proof was heard, and a deposition is copied into the record. Appellate court will assume that proof was heard. *Dehoney* v. *Sandford*, 2 Bush, 169.

60. Where the whole tract of land sold for less than the debt, judgment not erroneous which omitted to order the sale of so much as would satisfy the judgment. *Doughty* v. *Moss, &c.*, 1 Bush, 161.

61. Omission, in a judgment, to prescribe time and place of sale, cured by commissioner's report of sale—at the court-house, on a county court day, and after sufficient notice. *Same.*

62. A judgment *pro confesso*, without a jury or evidence, is erroneous—where no answer was filed to a petition which made no allegation of fact necessary to maintain the action. *Gould, &c.* v. *Bonds*, 1 Bush, 189.

63. A judgment by default, where defendant was not served with process, is a clerical misprision. (Sec. 578, Civil Code.) *Robinson* v. *Mobley*, 1 Bush, 196.

64. Court will not assume, on face of the record, that judgment was erroneous—because of a variance between the name of one plaintiff and the name in the note. The answer should have set this up, if an available defense. *Anderson* v. *Rogers & Clark*, 1 Bush, 200.

65. Judgment may be set aside, on motion, where a petition does not state facts sufficient to constitute a cause of action. *Hutchen* v. *Gibson*, 1 Bush, 271.

66. Court ought to have dismissed action for trespass, as to defendant served in another county, on his motion, before the judgment was entered on verdict of jury which found against him but *for* two defendants served in county where suit brought. (Sec. 108, Civil Code; 3 Met., 460.) *Ward* v. *George*, 1 Bush, 357.

67. No judgment can be rendered at that term, against one constructively summoned—who appeared for the first time by appealing from the judgment already rendered. *Beazley* v. *Maret, &c.*, 1 Bush, 466.

JUDICIAL OFFICERS.

1. Judicial officer, exceeding his authority or acting with malicious motives, is liable as a trespasser, to any injured party. *Ayars, &c.* v. *Cox*, 10 Bush, 201.

2. But no action can be maintained against such officer for acts within his jurisdiction, though illegal or erroneous, unless he acts from corrupt motives. (Revill, &c. v. Pettit, 3 Met., 314.) *Ayars, &c.* v. *Cox*, 10 Bush, 201.

JUDICIAL QUESTIONS.

Whether one has been guilty of an offense involving the forfeiture of his right to hold office or vote, in this State, can only be ascertained by indictment and trial by jury. *Commonwealth* v. *Jones*, 10 Bush, 725; *Burkett* v. *McCarty*, 10 Bush, 758.

JUDICIAL SALES.

1. See ABSENT DEFENDANTS; ASSIGNMENTS; JUDGMENTS; and HUSBAND AND WIFE.

2. In a suit to foreclose a vendor's lien securing two notes, both owned by plaintiff, one of which is *not* due, it is erroneous to decree a sale subject to a lien for the second note. *Emison* v. *Risque*, 9 Bush, 24.

3. The decree should simply direct the sale of enough of the land to pay the debt and costs then adjudged, leaving the second note to its lien on the remaining portion of the land. *Emison* v. *Risque*, 9 Bush, 24.

4. Judgment to sell land of a Confederate soldier, on constructive service, is held to be valid. *Thomas* v. *Mahone*, 9 Bush, 111.

5. Where an attachment has been levied on land, it is not liable to seizure and sale under execution issued pending the attachment suit, so as to defeat the attachment. *Husbands* v. *Jones, &c.*, 9 Bush, 218.

6. Where a portion of the land so attached was sold under order of court, and satisfied the debt, the portion not so sold will be subjected to the satisfaction of prior liens on the entire land; and if not sufficient, so much of the portion sold under attachment will be subjected as is necessary to satisfy the residue. *Ibid.*

7. A resale should not be ordered by the chancellor, nor should the biddings be opened upon the offer of an advance or increased bid of ten per cent.; there must be other objections to the sale or the biddings should not be opened. Decretal sales will not be disturbed or rejected by the chancellor for mere inadequacy of price, unless there has been such a sacrifice of property as to import fraud. *Stump* v. *Martin, &c.*, 9 Bush, 285.

8. Land not susceptible of division may be sold on petition of the joint owners. The husband need not give bond, nor is it necessary that his wife should be privily examined, in proceedings to sell land not susceptible of division, under the act of March 2, 1863. *Ibid.*

9. An accepted bidder at judicial sale may be compelled, by rule, to comply with the terms of his purchase. *Vance's adm'r* v. *Foster & Ray*, 9 Bush, 389.

10. The purchaser was not exonerated by the accidental loss of the property, in this case, before the sale was confirmed or the actual possession changed. *Ibid.*

11. When, at the time a sale is made, no valid ground for setting it aside exists, the accepted bidder is entitled to his purchase—however much the property may appreciate in value between the sale and time of confirming it; and the purchaser should be held bound by his purchase—although, from accidental causes, the property in the meantime may become impaired or depreciated in value. *Vance's adm'r* v. *Foster & Ray*, 9 Bush, 389.

12. The purchaser is required to comply with the terms of his purchase—although the property was partially destroyed by fire before the sale was confirmed, and before there was any actual change of possession. *Ibid.*

13. Remaindermen are not divested of their title, unless made parties to the proceeding and brought before the court. *Feltman* v. *Butts, &c.*, 8 Bush, 115.

14. Proceedings of judicial tribunals which have no jurisdiction of the subject-matter, are void; but if the court has jurisdiction of the subject-matter, and the proceedings are erroneous, the remedy is by appeal, and the title passes to the purchaser. *Dorsey, &c.* v. *Kendall*, 8 Bush, 294.

15. Purchaser induces others not to bid, and promises that the defendant may have the property when he returns home, by paying purchaser his money. The defendant must, within a reasonable time, offer to do so, and if he does, the court will regard the purchaser as holding the property in trust for defendant. *Roach* v. *Hudson*, 8 Bush, 410.

16. Sale of a part, to repair the residue, of a tract of land, in which there is a future contingent interest—not authorized by

the act of August 23, 1862 (Myers' Sup., 426). *Falls City Real Estate & Building Association* v. *Vankirk, &c.*, 8 Bush, 459.

17. Purchase at decretal sale of one's own land not binding, and bonds should be canceled. *Faris and wife* v. *Dunn, &c.*, 7 Bush, 276.

18. All proceedings under a void judgment are void. *Roberts* v. *Stowers*, 7 Bush, 295.

19. Purchasers under a void judgment take nothing by their purchase, and the sale bonds may be enjoined. *Brownfield, &c.* v. *Dyer, &c.*, 7 Bush, 505.

20. Sale must be in pursuance of notice, and notice must pursue the judgment to sell infant's land. (4 Bush, 70.) *Cofer* v. *Miller, &c.*, 7 Bush, 545.

21. Purchaser had suit brought against him to recover part of the land, before commissioner's report was confirmed. He could not resist collection of the money, but should have objected to the sale being confirmed. The title papers on file operated as notice to the purchaser of the title he was purchasing, and he cannot be allowed to say the title is not a good one. But before compelling him to pay the money, such title as the infants owned should be passed to him, and the guardian should, by proper proceedings, render valid and binding the decree and sale. *Huber* v. *Armstrong's widow and heirs*, 7 Bush, 590.

22. Defective proceedings to sell lot in Louisville, under sec. 543, Civil Code, may be perfected by supplementary proceedings. *Cornwall, &c.* v. *Cornwall, &c.*, 6 Bush, 369.

23. Judgment to enforce lien: Two tracts were ordered to be subjected to sale, without defining any particular interest or part as subject of sale. A *fi. fa.* creditor levied an execution on the land, and purchased it. He was entitled to discharge the vendor's lien, and set aside the decretal sale. *Bush* v. *Williams*, 6 Bush, 405.

24. Land conveyed "for the separate use of H. T. and the children now living of W. and H. T., and of any other children that may hereafter be born in wedlock," may be sold by the chancellor for reinvestment, on the same trusts and limitations binding the living as well as unborn grantees. *Ormsby* v. *Terry, &c.*, 6 Bush, 553.

25. Husband having made improvements on the trust estate, he and his wife mortgaged it to secure money borrowed to make improvements. On their petition, and prayer of mortgagee, his debt ordered to be paid and residue of proceeds reinvested. *Held*—that he and she were estopped to impeach the decree or sale. *Griffith* v. *Burton and wife*, 5 Bush, 358.

26. Land held for life, with remainder over to children, may be sold for reinvestment, under act of Feb. 16, 1858 (2 Stanton, 314). No bond, commissioner's report, and privy examination of married women, necessary under said act. *Same*, 314. The reason is, that the money is to be reinvested. *Griffith* v. *Burton and wife*, 5 Bush, 358.

27. All available objections to sales of real estate of infants and married women, under a decree of the Louisville chancery court, may be cured by proceedings under act of Feb. 25, 1868. *Turner, &c.* v. *Elb*, 5 Bush, 437.

28. Sale, after defendant's death, of land under execution, is void, and sheriff's deed also. (2 Bush, 515; 1 Bush, 207.) *Burge's adm'r, &c.* v. *Brown, &c.*, 5 Bush, 535.

29. Purchaser of real estate sold under decree prescribed by the act of August 23, 1862, by complying with the terms of sale, is invested with all the title of the present and future or contingent claimants to said real estate. *O'Neal* v. *Bannon*, 4 Bush, 23.

30. Purchaser of land sold for reinvestment cannot be prejudiced by failure of court to provide for securing and reinvesting proceeds of sale. *Same*, 23.

31. Purchaser announced that he would purchase for the owner's benefit, then absent, and prevented others from bidding. Two years after, he sold it for more than double the amount of his bid. The purchaser by his conduct raised an implied trust, and he was responsible for the profits made by his purchase and sale, and also for rents and interest. (3 Bibb, 179; 3 B. Mon., 426.) *Crutcher* v. *Hord and wife*, 4 Bush, 360.

32. Purchaser said he would purchase and hold for use of the defendant then absent. Property sold for its full value. Defendant failed to allege a tender, or offer reimbursement; his petition was properly dismissed. *Crutchfield* v. *Thurman*, 4 Bush, 498.

33. Proceedings being irregular, and infants and married women being interested and parties, and could not give consent or waive objections against the election and qualification of *pro tem.* judge, may be reversed. *Rudd, &c.* v. *Woolfolk, &c.*, 4 Bush, 555.

34. Acquiescence for 30 years repels presumption that deed was procured by fraud. *Conner and wife* v. *Downer, &c.*, 4 Bush, 631.

35. Charter, which authorized the bank to dispose of securities in all respects as natural persons may do under the common law, gives the bank the right to dispose of mortgaged property without intervention of the court. *Hahn* v. *Pindell*, 3 Bush, 189.

36. Purchaser may except to confirmation of commissioners' report of sale. *Allen* v. *Graves, &c.*, 3 Bush, 491.

37. A party acquired an equity after the rendition of the original decree, with the consent of plaintiff. Plaintiff cannot enforce decree without supplemental pleading, and bringing the party's representatives before the court. *Hackett, &c.* v. *Conn*, 3 Bush, 578.

38. Purchaser who shows that the land is not subject to sale, should be discharged. *Stewart and wife* v. *Brady*, 3 Bush, 623.

39. A purchaser at a judicial sale should not be disturbed, unless he, in some manner, obtained an unconscientious advantage. (2 B. Mon., 411; 3 Met., 544.) *Lusk & Gill* v. *Salter*, 2 Bush, 201.

40. Purchaser of land under judgment may by motion, upon notice to the tenant, recover rent accrued after confirmation of sale. The motion must be entered on the motion docket. (Secs. 376, 381, 384, Civil Code.) *Cooper* v. *Baker*, 2 Bush, 244.

41. A sale by commissioner is not concluded until judicially ratified by the court. Where the whole land did not sell for enough to pay the debt, the defect in the judgment failing to require only so much to be sold as would pay the debt, is cured; and if the judgment fails to fix time and place of sale, the commissioner's report showing that it was sold at the court-house door, on a court day, after sufficient notice, cures the defect. (1 Bush, 161.) *Egard* v. *Chearnly, &c.*, 1 Bush, 12.

42. In sales of estates under orders of court, the commissioner is the mere agent of the court. *Miller, &c.* v. *Hall and wife*, 1 Bush, 229.

The vendee of the purchaser stands in no better condition than his vendor; and if the sale is set aside, he is affected thereby. *Same*, 229.

43. The general rule is to uphold judicial sales; but this is an exception, where a married woman's estate has been sold as the property of another, and before the sale is completed by conveyance an appeal is prosecuted to a reversal of the judgment; and all persons are affected by notice of the appeal. The purchase money should be refunded, and a lien retained on the property till done. But the *feme covert* should elect which to take—the property or its proceeds. *Same*, 229; *Salter* v. *Dunn, &c.*, 1 Bush, 311.

44. Where the title is so questionable as to prevent a fair sale, it is error to order one. *Skillman* v. *Hamilton, &c.*, 1 Bush, 248.

45. Judgments for sale of attached lands being reversed, all the sales should be set aside. L. having conveyed the land purchased by him to his minor children, for a voluntary consideration, they are subject to all the equities of their vendor. Purchasers having paid the purchase money, are entitled to have it repaid by those who received it. *Salter* v. *Dunn, &c.*, 1 Bush, 311.

46. A notice to sell land in gross, and a sale in parcels, is invalid, and *e converso*. The notice must be pursuant to the judgment, and sale pursuant to notice. *Hahn* v. *Pindell*, 1 Bush, 538.

47. Acts of Sept. 30, 1861, and March 1, 1862 (Myers' Sup., 424–5), providing for curing defective sales of infants' estates, *held* to be constitutional. *Pettit's adm'r, &c.* v. *Johnson*, 1 Bush, 607.

JURISDICTION.

1. See ACTION (9 Bush, 708); CRIMINAL LAW; and WILLS.

2. If the patent rights of A. have been violated or infringed, his remedy must be in the tribunals provided by the act of Congress, as the courts of Kentucky have no jurisdiction of the subject-matter. *Crawley* v. *Vaughan, &c.*, 11 Bush (Nov. 5, 1875).

3. In actions for the recovery of money, the jurisdiction of the court over the subject-matter depends alone upon the amount claimed; and cannot be in any way affected by the nature of the demand sued for. *Johnston* v. *City of Louisville*, 11 Bush (Nov. 11, 1875).

4. In misdemeanor cases, the jurisdiction of the court of appeals is limited to prosecutions where the punishment exceeds a fine of $50, or imprisonment for thirty days, or both. *Baer* v. *Commonwealth*, 10 Bush, 8.

5. No judgment can be rendered against a defendant summoned in a county different from the one where suit was brought, if the action is dismissed as to those served in the county, or if judgment is rendered in their favor, or if the case is not ready for judgment against the latter. (Civil Code, sec. 108.) *Duckworth* v. *Lee*, 10 Bush, 51.

6. If judgment is rendered against a defendant not summoned in the county where the action is brought, before one is or can be rendered against a defendant summoned in that county, it will be rendered before the action stands for trial, and will be deemed a clerical misprision. (Civil Code, sec. 578.) *Duckworth* v. *Lee*, 10 Bush, 51.

7. A judgment can not be reversed for a defect in the indictment that does not authorize an arrest of judgment. *Weatherford* v. *Commonwealth*, 10 Bush, 196.

8. A judgment can be arrested only when the indictment does not contain facts showing a public offense. (Crim. Code, sec. 271.) *Weatherford* v. *Commonwealth*, 10 Bush, 196.

9. Justices' and quarterly courts have exclusive jurisdiction of actions to recover amounts not exceeding $50, exclusive of interest and costs. *Burnes* v. *Cade*, 10 Bush, 251.

10. A judgment for $50 having been rendered by a quarterly court, a common pleas court had no jurisdiction of an action to subject a debt due to defendant to the satisfaction of the judgment. The action should have been brought in the quarterly court. *Burnes* v. *Cade*, 10 Bush, 251.

11. In matters of probating wills and granting letters of administration, the jurisdiction of county courts is general and exclusive. *Jacobs' adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

12. Where courts have no jurisdiction over certain subjects except when certain facts exist, the facts conferring jurisdiction must appear in the record. But if the jurisdiction is complete, the action of the court is presumed to be within it. *Jacobs' adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

13. The jurisdiction of county courts in matters of probate, etc., may be questioned collaterally, where the proper averments are made; but the *onus* is on the party raising the issue. *Jacobs' adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

14. The court first acquiring jurisdiction can not be ousted. *Hawes, &c.* v. *Orr, &c.*, 10 Bush, 431.

15. Courts of equity can not enjoin courts of law from proceeding where the latter has jurisdiction. A railroad company obtained a *mandamus* against the judge of a county court, to compel him to issue county bonds in compliance with a subscription for stock; and before he had complied, certain tax-payers brought suit in a court of equity and enjoined him from issuing the bonds; but did not enjoin the company from enforcing the writ. *Held*—that the court issuing the *mandamus* had the right, and could not refuse, to compel obedience to it, and the injunction interposed no legal obstacle to its enforcement. *Cumberland & Ohio R. R. Co.* v. *Judge of Washington County Court*, 10 Bush, 564.

16. The court of appeals has no jurisdiction to reverse a judgment of acquittal in misdemeanors. (Sec. 347, Criminal Code.) *Commonwealth* v. *Dobbins*, 9 Bush, 1.

17. Circuit courts have jurisdiction to enforce liens and subject lands to the payment of demands less than $50. *Craig &c.* v. *Garnett's adm'r, &c.*, 9 Bush, 97.

18. Circuit courts had jurisdiction to sell land of Confederate soldiers, on constructive service, during the late civil war. *Thomas* v. *Mahone*, 9 Bush, 111.

19. Attorneys appointed to defend for absent defendants, and bonds to restore the property, etc., as provided for in sec. 440, Civil Code, are for the protection of the interests of the absent defendants, and not to give the court jurisdiction. *Ibid.*

20. The failure of the attorney-to-defend to correspond with the defendant, does not affect the validity of the steps taken by the court. *Ibid.*

21. The jurisdiction is acquired thirty days after the order of warning, at which time the defendant is deemed to be constructively summoned. Jurisdiction of the court over the thing sought to be sold, and the jurisdiction acquired over the person of the defendant by the constructive service of process provided by law, authorizes the court to proceed; and, although failure to appoint the attorney, or to take the bond as required by sec. 440, Civil Code, are reversible errors, the jurisdiction being complete, the judgment will not be void. *Ibid.*

22. For the satisfaction of the lien notes, the court had jurisdiction to sell the land, independent of the lien attempted to be created by the attachment sued out by the holders of these notes. *Ibid.*

23. Where a judicial sale of a railroad was made by the Fayette circuit court, and the supervision of the property sold was retained by that court for the purpose of carrying out the terms of the sale, the Kenton circuit court has jurisdiction in an original action to charge the purchaser as a trustee for the corporation. *Covington & Lexington Railroad Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

24. Jefferson court of common pleas has jurisdiction to issue a mandamus against the mayor of Louisville, to compel him to issue and sell bonds of the city, and with the proceeds pay into the city court for property condemned for city purposes. *Duncan, trustee, &c.* v. *Mayor of Louisville*, 8 Bush, 98.

25. State courts have jurisdiction of personal actions by the owners of one boat against the owners of another boat, for a collision on the Ohio river. *Digby* v. *Kenton Iron Co.*, 8 Bush, 166.

26. Courts can make proper allowances to commissioners, without special notice to the parties. But the mode pointed out by the statute must be pursued. *Underwood* v. *Dickinson*, 8 Bush, 337.

27. Errors as to the *forum* of the proceedings are waived by a submission of the case without objection. (1 Met. 593.) *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

28. Where jurisdiction is rightfully acquired for one purpose, the court should grant relief as to the whole matters put in litigation. *Landrum* v. *Farmer*, 7 Bush, 46.

29. Agreed case: Code requires affidavit under sec. 705, Civil Code; but where the agreement does not dispense with proof, no affidavit required. *Canaday* v. *Hopkins, committee, &c.*, 7 Bush, 108.

30. Court of appeals has jurisdiction of every final order or judgment, where it relates to an office, franchise, or freehold. *Smith* v. *Cochran and Commonwealth*, 7 Bush, 147.

31. State courts have jurisdiction to enforce liens, acquired by suits, upon property conveyed by a bankrupt before his discharge. *Payne & Bro.* v. *Able, &c.*, 7 Bush, 344.

32. Jurisdiction in attachment cases depends upon the actual or constructive service of process on the defendant; not upon the affidavit of plaintiff or the clerk's order. (4 Met., 346.) *Bailey* v. *Beadles & Bolinger*, 7 Bush, 383.

33. Plaintiff is not entitled to a judgment against the defendant served with process in another county—unless the proof shows that the defendant summoned in the county should have judgment rendered against him, even should he fail to plead to the action. (3 Met., 459; Civil Code, sec. 108.) *Meguiar* v. *Rudy*, 7 Bush, 432.

34. On a return of "no property found," an equitable action may be brought in any county in which the defendant resides or is summoned (sec. 474, Civil Code); and if a judgment before a justice, a copy of it and of the *fi. fa.* must be filed in the clerk's office of the circuit court, and execution issued as provided in sec. 846, Civil Code, if land is sought to be subjected. (2 Duvall, 91.) *Austin* v. *Payne*, 7 Bush, 480.

35. Warning order being void, judgment and sale void. *Brownfield, &c.* v. *Dyer, &c.*, 7 Bush, 505.

36. Jurisdiction under sec. 543, Civil Code, is not controlled by sec. 97 of same. *Girty and Frame* v. *Logan, &c.*, 6 Bush, 8.

37. Owners of steamboats running on the Ohio river are liable, in the State courts, for damages for negligent loss of property shipped on the boat. *Rake* v. *Owners of Steamboat Potomac*, 6 Bush, 25.

38. Action on guardian's bond must be brought in the county in which the guardian qualified. (Civil Code, sec. 98.) *Greenly* v. *Daniels*, 6 Bush, 41.

39. Franklin circuit court, as the fiscal court, has jurisdiction under sec. 492, Civil Code, of all actions in favor of the Commonwealth, when the attorney general shall see proper to resort to it. *Phœnix Ins. Co.* v. *Commonwealth*, 5 Bush, 68.

40. Courts will enjoin illegal tax, or sale of property therefor, either of an individual or corporation. *Louisville & Nashville R. R. Co.* v. *Warren County Court*, 5 Bush, 243.

41. State courts cannot proceed *in rem* against a foreign vessel. The act of 1789 saves to the State courts common law jurisdiction, with common law remedies; but the right to proceed *in rem* was not a common law remedy, and was derived from the civil law. But so long as the shipwright retains possession of the craft, he has a lien for repairs done or materials furnished a foreign vessel. But a proceeding *in personam*, with attachment, the State courts can doubtless entertain, as such lien is not of original admiralty jurisdiction. (4 Wallace, 411; Same, 571; 39 N. York, 19; 7 Wallace, 631.) *Marshall & Kilpatrick* v. *Curtis, &c.*, 5 Bush, 607.

42. Service of a summons on one out of the county, of two defendants sued, and no service on the one in the county: Judgment cannot be taken by default; and if it should be done, by appealing he does not enter his appearance to the action, and upon the return of the case to the circuit court, nothing further appearing to authorize judgment, action should stand until service on the other defendant. (Civil Code, 107, 110; Randall v. Shropshire, 4 Met., 327; 16 B. Mon., 350; 2 Duvall, 540.) *Dyas* v. *Lindsey*, 4 Bush, 349.

43. Article 1, chap. 86, Rev. Stat., requires it to be alleged and proved that the share of each heir is not of greater value than $100. *Gardner and wife* v. *Craddock, &c.*, 4 Bush, 370.

44. The county of which the defendant was sheriff is the county where he should be sued for failing to levy and return an execution. (Civil Code, sec. 94; secs. 3 and 4, art. 18, chap. 36, Rev. Stat., 1 Stanton, 493, repealed by secs. 748, 875, and 908.) *Groom's adm'r* v. *Pickett, &c.*, 4 Bush, 372.

45. A special contract was made by the owner of a steamboat for boilers furnished and repairs made on the engine, and a note given therefor by him, at Evansville, Indiana. Boat was attached, and personal judgment rendered against the owner,

and to enforce the lien on the boat, in the Livingston circuit court. *Held* to be right. *Steamboat Hyatt and Owner* v. *Reitz & Haney*, 4 Bush, 395.

46. Pendency of a prior suit, on the same debt and between same parties, in another State, will not abate a suit here. *Davis* v. *Morton, Galt & Co.*, 4 Bush, 442.

47. Plea to the jurisdiction, after defense upon the merits, comes too late, unless for want of jurisdiction over the subject-matter of the action. *Baker* v. *Louisville & Nashville R. R. Co.*, 4 Bush, 619.

48. For failing to pay over money collected on execution, the sheriff must be sued in the county where the sheriff qualified. (Sec. 94, Civil Code.) *Foster, &c.* v. *Wade, &c.*, 4 Bush, 628.

49. The State courts have jurisdiction in cases of collision between two boats—the result of mutual and equal fault—in a personal action between the owners of the boats. It is not a proceeding *in rem*, but a personal action. (Sec. 16, chap. 7, Rev. Stat., 1 Stanton, 207.) *Stewart* v. *Harry*, 3 Bush, 438.

50. Circuit court has jurisdiction on petition of one of the owners, to order sale of a house and lot not susceptible of division, although the joint owners protest against the sale. (Act Feb. 15, 1866, Myers' Sup., 751.) *Burgess* v. *Eastham, &c.*, 3 Bush, 476.

51. Action in the Gallatin circuit court against the captain and owners of a steamboat, to recover for loss of a slave carried off unlawfully by the boat, and lost: Process served on the captain in Gallatin county, and on the owners in Jefferson county. After captain's death and abatement as to him, the Gallatin circuit court had jurisdiction of the action against the other defendants. *Shirley, &c.* v. *Landram*, 3 Bush, 552.

52. Daviess circuit court has no jurisdiction to sell infants' lands lying in Nelson county, although the land descended to them from their father, who resided in Daviess county at the time of his death. *Montgomery, gdn., &c.* v. *Montgomery*, 2 Bush, 49.

53. The court having the jurisdiction of the person and cause of action, the proceedings *in rem* attached as an incidental remedy, and the Madison circuit court had jurisdiction to sell lands in controversy lying in Estill county. *Webb* v. *Wright, &c.* 2 Bush, 126.

54. The amount claimed and litigated before the justice of the peace, determines when an appeal may be taken from the judgment. *Donahue* v. *Murray*, 2 Bush, 194.

55. A city court having jurisdiction of misdemeanors, has no jurisdiction to try persons charged with setting up a faro bank, gaming tables, etc., in such city. *Flynn & Atkinson* v. *Commonwealth*, 2 Bush, 590.

56. County judges cannot try breaches of the peace on their own warrants. *Scott* v. *West*, 1 Bush, 23.

57. Where no ground of necessity existed for binding out a negro boy, the county court had no authority to do so. *Thomas, &c.* v. *Newcom*, 1 Bush, 83.

58. Madison circuit court has no jurisdiction to enforce lien on land in Estill county. *Webb* v. *Wright*, 1 Bush, 107.

59. Circuit courts have no jurisdiction of a suit on note for $50. *Griswold* v. *Peckenpaugh*, 1 Bush, 220.

60. Circuit courts have no jurisdiction to enforce penalty for failing to give in list of taxable property. *L. & N. R. R. Co.* v. *Commonwealth*, 1 Bush, 250.

61. An action of trespass against three defendants; process served on two in the county where the action was brought, and on the other in another county. Jury found for the two defendants, and against the one. The action should have been dismissed as to him. (Civil Code, sec. 108; 3 Met., 460.) *Ward* v. *George*, 1 Bush, 357.

62. The will of J. J. F. was probated in the then county of Campbell, in Nov., 1835. His executrix died in Kenton county, in 1840, in possession of her own and testator's estate. The county of Campbell was divided in the meantime, and Kenton created. The personal representative of the testatrix qualified in Kenton, and became the representative of both estates. The Kenton circuit court had jurisdiction of an action filed in 1852 for settlement and distribution of the estate of J. J. F. *Flournoy's devisees, &c.* v. *Flournoy's ex'r, &c.*, 1 Bush, 515.

63. Circuit court had jurisdiction to sell slaves and divide proceeds, independent of chap. 86, Rev. Stat., upon the application or concurrence of all the parties interested. *Pettit's adm'r, &c.* v. *Johnson*, 1 Bush, 607.

JUSTICES OF THE PEACE.

1. Justices may fine persons for failure to attend and work on roads, as provided in sec. 23, art. 1, chap 84, Rev. Stat. *Ayars, &c.* v. *Cox*, 10 Bush, 201.

2. A *capias pro fine* or other final process may be issued by the justice, to enforce a judgment in such case in favor of the Commonwealth. (Sec. 15, art. 12, chap. 83, Rev. Stat.) *Ayars, &c.* v. *Cox*, 10 Bush, 201.

3. A case appealed from a justices' to the quarterly court can not, by agreement of the parties, be transferred to the circuit court without a trial in the quarterly court. *Davis* v. *Davis*, 10 Bush, 274.

4. The circuit court can not adjudge that the justice's judgment "be reversed," &c. It can only render judgment for what is due, or dismiss the action, or dismiss the appeal. *Bennett* v. *Thompson*, 10 Bush, 365.

5. Order of justices' or quarterly courts sustaining an attachment may be appealed from to the circuit court (sec. 292, Civil Code), without appealing from the personal judgment for the debt; and such appeal will not prevent the creditor from collecting his judgment by execution. *Hawkins* v. *Baldauf & Bro.*, 10 Bush, 624.

LAND.

1. Land is not forfeited, under sec. 12, art. 9, chap. 83, Rev. Stat., when one year's tax shall have been due two years; but only "where two years of tax shall be due" is a forfeiture authorized. *Nesbitt* v. *Liggitt*, 11 Bush, 137.

2. Any person may obtain an order of the county court to enter and survey any number of acres of vacant lands, not less than twenty-five nor more than two hundred acres, as prescribed in sec. 3, chap. 102, Revised Statutes. *Register* v. *Reid*, 9 Bush, 103.

3. The same person can purchase and obtain several orders of the county court, each for two hundred acres, or any less num-

ber, not less than twenty-five acres each. *Register* v. *Reid*, 9 Bush, 103.

4. Grant of right of way to a railroad, to be void if the county should vote a tax for the road. The tax was voted. *Held*—that the condition subsequent was broken, though the road meanwhile had changed hands. *Kenner, &c.* v. *American Contract Co.*, 9 Bush, 202.

5. At common law, a fee-simple estate could be destroyed by breach of condition subsequent, only upon an entry by the grantor or his heirs. *Ibid.*

6. But an estate for years, not being created by livery of seizin, upon breach of condition subsequent, was terminated without re-entry. *Ibid.*

7. Land, not susceptible of division, may be sold on the petition of the joint owners. *Stump* v. *Martin, &c.*, 9 Bush, 285.

8. By leasing her dower interest to the remainderman, she divested her right and title to the land. The tenant for life, and not the remainderman, must pay the taxes assessed against the land; and, in this case, the remainderman having leased the life estate, became liable for the taxes. The fee-simple and life estate were united, and the lesser merged in the greater estate. *Fox* v. *Long*, 8 Bush, 551.

9. Where each share of the land sought to be divided is not of the value of $100, the court may order a sale without partition, and may order the shares of those who desire it laid off to them. These should be so laid off adjoining their other land, if no detriment be done the other parties by so doing. *Graham, &c.* v. *Graham, &c.*, 8 Bush, 334.

10. Sale of part of land, where there is a future contingent interest, cannot be made to repair, and improve the residue. *Falls City Real Estate and Building Association* v. *Vankirk, &c.*, 8 Bush, 459.

11. Land held for life, with remainder over, may be sold for reinvestment. *Ewing* v. *Riddle, &c.*, 8 Bush, 568.

12. Testator devised lands to his son, and his heirs and assigns forever; and if "he shall die without lawful issue," the land shall go to his sisters, and if either or both of them be dead, to the child or children of such dead sister. The son took a defeas-

ible fee, and not an estate tail. *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

13. The owner of land adjacent to the land of another has no right to remove the earth and withdraw the natural support. He may be restrained by injunction from doing so, and is liable in damages if he does so. This doctrine is confined to cases in which the owner has not, by building or otherwise, increased the lateral pressure upon the adjoining soil. A fence is not such a structure. Whether a privy vault and frame building over it increased the pressure, left for the jury to decide. *Oneil* v. *Harkins*, 8 Bush, 650.

14. Prior to the act of March 22, 1871, railroad stock was regarded as real estate. *Copeland* v. *Copeland, &c.*, 7 Bush, 349. Said act is copied in full, 7 Bush, 352.

LANDLORD AND TENANT.

1. Landlord's lien sustained to an amount greater than the indemnifying bond given, when the property subject to the lien was seized in execution. *Secrets, &c.* v. *Markwell*, 11 Bush, (Sept. 22, 1875).

2. Landlords attaching for rent are not held to the same strictness of proof as other attaching creditors. Landlords are preferred and are given an exclusive lien. (Act of Feb. 16, 1858.) *McLean* v. *McLean*, 10 Bush, 167.

3. A landlord may attach when he has reasonable grounds to apprehend that he will lose his rent by the removal of property without his consent. *McLean* v. *McLean*, 10 Bush, 167.

4. The general rule of law is, that a mortgage or grant, of property to be acquired *in futuro*, is void. 10 Bush, 538.

5. Where, by the terms of a lease, the crop to be grown on the leased premises was pledged for the payment of the rent, the landlord's claim cannot avail against the exemption rights in favor of the tenant's family. *Vinsen* v. *Hallowell, &c.*, 10 Bush, 538.

6. A lessee may bring an action against a sub-lessee or assignee on the covenant of the sub-lessee to pay rent to him. *Trabue* v. *McAdams*, 8 Bush, 74.

7. A lessee may prosecute a cross-action against his assignee to compel him to discharge the rent. *Same*, 74.

8. The purchaser of a lease, by operation of law, becomes the assignee, and the assignee becomes responsible for the rent from the time of the assignment. But he may discharge himself by an assignment of the unexpired term. *Same*, 74. So long as the other was a joint owner the possession of his co-tenant was his possession, and responsible to the lessor for rent. *Same*, 74.

9. Demand of possession of a tenant or *quasi* tenant must be made, before action for the recovery can be maintained; but when he claims the land in fee, and no contract express or implied for possession between him and claimant, demand not necessary. (3 Dana, 291; 4 Dana, 264; 5 Dana, 232.) *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

10. Tenant is bound to pay rent, though the premises should be destroyed by fire. *Helborn & Co.* v. *Mofford, &c.*, 7 Bush, 169. If the rent is payable in anything but money, the same is not assignable. *Same*, 169.

11. Action for use and occupation only lies where the relation of landlord and tenant exists. *Richmond & Lexington Turnpike Co.* v. *Rogers*, 7 Bush, 532.

12. Distress cannot be issued, where the rent is to be ascertained by arbitration. *Myers* v. *Mayfield*, 7 Bush, 212.

13. Tenancy under an agreement to purchase, is not subject to forcible entry. *Reader & Klette* v. *Bell*, 7 Bush, 255. The term expired 1st of April. Notice that the landlord would be ready to receive possession, 1st March thereafter, not sufficient notice. *Same*, 255. Disclaimer of the tenancy more than two years before the date of the warrant, does not dispense with notice to quit. *Same*, 255.

14. Landlord may sue for his rent, and still distrain or attach for the same rent. *Brandt* v. *Hyatt, &c.*, 7 Bush, 363. Defendant alleged that affidavit and bond as required had not been given before the justice. He must prove the negative allegation, or the court will presume that the justice did his duty. (Greanleaf on Evidence, secs. 78, 80; 2 B. Mon., 26.) *Same*, 363. If attachment issues before bond is given, it will be quashed. *Same*, 363.

15. It was not the duty of the tenant to leave the house unoccupied at the expiration of his term, without demand or expressed readiness of possession by the landlord. *Kyle* v. *Proctor, &c.*, 7 Bush, 493.

16. Use of an unimproved bank of the Ohio river in moving rafts, will create the relation of landlord and tenant between the riparian owners of the bank and the owners of the rafts. *Hull & May* v. *Jacobs & Co.*, 7 Bush, 595.

17. The law will, under certain circumstances, imply the relation of landlord and tenant, and a contract to pay rent. *Same*, 595.

18. For a forcible entry and trespass, on land in possession of a tenant, the owner may maintain an action. *Holderman* v. *Middleton*, 6 Bush, 44.

19. Tenant may, without waiving his rights, yield the possession, without litigation, to one whose claims he cannot successfully resist. *Winstell, &c.* v. *Hehl*, 6 Bush, 58.

20. Claimants in possession—not renters, but holding under an honest claim against the rightful owner—are responsible for use and occupation; and are entitled to compensation for lasting improvements which ameliorated the land. *Moore, &c.* v. *Calvert, &c.*, 6 Bush, 356.

21. Sub-tenant delivered the key of the house to the tenant, with the intention of giving him possession. He then borrowed the key, and gave it to the landlord, who took possession. *Held* —that the tenant, under his writ of forcible entry, was entitled to judgment for possession. *Haupt* v. *Pittaluga*, 6 Bush, 493.

22. Parol purchaser of land is entitled to compensation, against vendor and his privies, for ameliorations to land. *Glass* v. *Abbott*, 622.

23. An old man entered on land, under a parol agreement that he should have the use of it for his life, and made permanent improvements to revert to the owner at the old man's death. The owner sued for the possession. *Held*—that the tenant was entitled to the value of his improvements and a lien on the land therefor, with interest from the date of the disaffirmance; and that after the notice to quit, he was liable for rent. *Reed* v. *Lander*, 5 Bush, 21.

24. Occupant who improved land in good faith, believing it to be his own, being evicted by superior title, is entitled to value of ameliorations, so far as they have enhanced the value of the land —to be estimated at the time of eviction. He is liable for the use of the land as unimproved by him, and interest on its annual value. *Pulliam, &c.* v. *Jennings*, 5 Bush, 433.

25. A refusal to surrender, and wrongful holding over when possession has been demanded, after the expiration of the term, subjects the tenant to double rent from the date of the demand and refusal. *Beynroth* v. *Mandeville*, 5 Bush, 584.

26. Landlord cannot evict tenant, without accounting for improvements, by forcible detainer—where the tenant made the improvements under a promise and assurance that he should have the premises as long as he paid a stipulated rent. *O'Neal* v. *Orr*, 5 Bush, 649.

27. By taking personal surety, a landlord does not waive his lien for rent; and the surety may take up the bond and have it assigned to him, to substitute him to all the rights of the landlord. The sale of tenants' property on which landlord has a lien, may be suspended by landlord or surety under sec. 713, Civil Code. *Smith* v. *Bell's adm'x*, 4 Bush, 92.

28. Land in Mississippi, leased by parties in Kentucky by telegrams, nothing being said about time when rent to be paid: The law and custom of Mississippi governs time of payment. *Calhoun* v. *Atchison, &c.*, 4 Bush, 261.

29. The lessees failing to cultivate it, the landlord cultivated a part. Lessees are entitled to a credit for the *pro rata* value of that portion which he cultivated. *Same*, 261.

30. A contract to pay stipulated sum for rent of a house and lot, and make certain specified improvements, is not assignable so that the assignee can sue in his own name. *Hicks & Gill* v. *Doty*, 4 Bush, 420.

31. Tenant remaining in possesion after expiration of his lease, cannot be construed into a refusal to deliver possession. (2 Bush, 176.) *Thompson* v. *Marsh*, 4 Bush, 423.

32. Persons in possession, not as tenants of any one, by accepting leases of one claiming the land, are estopped to deny his title; and without renunciation and notice, their possession could

not become adverse to such landlord. *Patterson, &c.* v. *Hansel, &c.*, 4 Bush, 654.

33. Distress for rent may be discharged by bond under sec. 721, Civil Code; or may be replevied by virtue of sec. 28, art. 2, chap. 56, Rev. Stat., 2 Stanton, 97; and if the amount was greater than should have been, it will not affect the validity of the replevin bond. *Dean* v. *Ball*, 3 Bush, 502.

34. An assignment of a title bond for land is an equitable assignment of the rent at the end of the year. *Epperson* v. *Blakemore*, 2 Bush, 241.

35. A lease, with the privilege to the tenant to erect buildings, without fully reciting the agreement in reference thereto, whether to be paid for by the landlord or removed by the tenant at the end of the term? This ambiguity may be supplied by parol evidence. *Gray* v. *Oyler*, 2 Bush, 256.

36. If a sub-tenant is accepted by the landlord as his tenant, he thereby discharges the original tenant from his responsibility for rent which accrues thereafter. *Stimmel & Bryant* v. *Waters*, 2 Bush, 282.

37. A tenant in possession for a number of years is entitled to notice to quit, before an action is brought against him. But if an action be brought and dismissed, and another be brought, the first action will be deemed notice. *Cornellison* v. *Cornellison*, 1 Bush, 149.

38. A stipulation for the landlord to re-enter, &c., for non-payment of rent, and the tenant fails, will not forfeit the lease if he shall pay the rent when demanded, or before the landlord suffers loss or inconvenience from the delinquency. *Wilson* v. *Jones & Tapp*, 1 Bush, 173.

39. A statement on oath is necessary to obtain an attachment for rent. If it is not returned on the return day, reasonable time should be given to defend it. *Worstell* v. *Ward*, 1 Bush, 198.

40. A landlord may resume the control of the premises, with the consent of the tenant, and terminate the lease. *Williams & Davis* v. *Jones and wife*, 1 Bush, 621.

LATERAL SUPPORT.

1. See LAND.

2. The owner of land adjacent to the land of another has no right to remove the earth, and thus withdraw the natural support of his neighbor's soil; and if he does, he is liable for damages, or may be restrained by injunction. This doctrine is strictly confined to those cases in which the owner of land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil. (2 Hilliard on Torts, 152, 153; Farrand v. Marshall, 19 Barbour, 380.) An ordinary fence is not such a structure as will, by reason of the additional weight it may add to the soil, deprive the owner of the right to recover for loss or injury to his realty. Whether a privy-vault and frame building over it increased the pressure in this case, was a fact to be determined by the jury. *Oneil* v. *Harkins*, 8 Bush, 650.

LAWS.

1. General legislation does not usually apply to or control special acts. *Tyler's ex'r* v. *Elizabethtown and Paducah R. R. Co.*, 9 Bush, 510.

2. The Commonwealth is not embraced by acts made to operate between individuals, unless there is something in them showing an intention to subject the State to the rules prescribed. *Nall* v. *Springfield, &c.*, 9 Bush, 673.

LEASEHOLDS.

Leaseholds are to be listed for taxation as personalty—not as real estate. *Wilgus* v. *Commonwealth*, 9 Bush, 556.

LEGAL TENDER.

1. Promissory note to be paid "in legal tender greenback money, and should it depreciate, and the exchange is above one dollar and forty cents, then we are to make it good to him at

one dollar and forty cents." Plaintiff elected to have greenbacks, and the judgment was properly rendered therefor. *Ledford* v. *Smith*, 6 Bush, 129.

2. Since the legal tender enactment, contracts to pay in gold should be specifically enforced. *Hall* v. *Hiles*, 2 Bush, 532; *Glass* v. *Pullen*, 6 Bush, 346.

3. Purchaser of encumbered property at sheriff's sale, having paid for it in depreciated currency, when the property is redeemed must receive back same kind of currency. *Sandford* v. *Farmers' Bank, &c.*, 1 Bush, 335. (7 Dana, 301).

4. Gold and silver alone constitute a legal tender, in the payment of debts contracted to be paid in money. *Riley's ex'r* v. *Sharp, &c.*, 1 Bush, 348.

5. Receipt of currency, without prejudice to his rights, is not a satisfaction of the debt; but creditor must pay into court such currency as he received, with interest, before he will be entitled to a judgment for his debt. *Same*, 348.

LEGITIMACY.

1. "Children" and "issue," as used in chap. 30, Rev. Stat., title "Descent and Distribution," includes all children and issue who by law are capable of inheriting, and is not confined to children born in lawful wedlock. *Drain, &c.* v. *Violett, &c.*, 2 Bush, 155. A natural son—being recognized by his father, and an act of the legislature procured to make him capable of inheriting his estate—will inherit it if he survives the father. *Same*, 155.

2. In the absence of negative evidence showing that the parents were not married, the law presumes the offspring to be legitimate. *Strode, &c.* v. *Magowan's heirs*, 2 Bush, 621.

3. Rumor is insufficient to require proof of actual marriage or bastardize children. Reputation on a question of this kind must originate in the family. The testator treated the descendants of his half-brother as legitimate. Whether their father was or not, the testator considered them as of the class of his lawful heirs. *Same*, 621.

LEX LOCI CONTRACTUS.

1. Law of another State, when relied upon, must be pleaded as any other fact. The failure of consideration of a note executed in Ohio, payable in Illinois, established in this case by the laws of Kentucky. *Roots* v. *Merriwether*, 8 Bush, 397.

2. The common law presumed to be in force in Illinois, nothing to the contrary appearing. *Honore* v. *Hutchings*, 8 Bush, 687.

3. Set-off is a part of the remedy. If allowed by the laws of this State where the suit is brought, though not allowed where the contract was made, can be made available here. (Story on Conflict of Laws, secs. 575, 581; 2 Parsons on Notes and Bills, 375; 6 Dow, 116; 6 B. Mon., 599; 1 Met., 317.) *Davis* v. *Morton, Galt & Co.*, 5 Bush, 160.

LIBEL.

1. No words written or spoken are actionable, unless published with malice, express or implied; and although malice will be implied, *prima facie*, from the falsehood of a slanderous imputation, yet the manner and occasion of the publication may rebut such an implication, and impose on the plaintiff the burden of proving express malice. *Lucas* v. *Case, &c.*, 9 Bush, 297.

2. Words written or spoken in the regular course of church discipline, or before a tribunal of a religious society, to or of members of the church or society, are, as among the members themselves, privileged communications, and are not actionable, without *express malice*. *Ibid.*

3. Malice will never be presumed from a confidential communication, made prudently and in good faith, either through benevolence to the party concerning whom it is made, or in the discharge of a legal, social, or moral obligation. *Ibid.*

LICENSE.

1. See INSURANCE (9 Bush, 590).

2. The power to grant the privilege of retailing intoxicating liquors, under act of January 23, 1867, must be exercised with

discretion, and license should be granted only when deemed expedient, proper, or beneficial to the community. *Pierce* v. *Commonwealth*, 10 Bush, 6.

3. The court of appeals will not interfere when the proper tribunal has acted in the matter, unless there has been a palpable abuse of discretion. *Pierce* v. *Commonwealth*, 10 Bush, 6.

4. The indictment failing to show that the accused was a licensed vendor of spirits, the only penalty that could be inflicted was a fine of fifty dollars. *Baer* v. *Commonwealth*, 10 Bush, 8.

5. One licensed as a green-grocer by a city is subject to reasonable regulations adopted for the public good. *City of Bowling Green* v. *Carson*, 10 Bush, 64.

6. Druggists may sell liquors for medicinal purposes without license. *Anderson* v. *Commonwealth*, 9 Bush, 569.

7. The failure of the resident factor to procure a license, cannot prevent a recovery by the non-resident principal of the price for the goods sold by the factor and shipped directly by the non-resident to the purchaser. *Graham & Co.* v. *Duckwall, Fitch & Co.*, 8 Bush, 12.

8. Obtaining license from the county court to keep a coffee-house and not doing so from town trustees, does not make keeper liable for fine of $60 for keeping tippling-house. *Freeman* v. *Commonwealth*, 8 Bush, 139.

LIENS.

1. See ATTORNEYS.

2. A bank can have no lien on its stock, until the stockholder becomes indebted to the bank. The bank has no right to extend credit to its stockholder, on the faith of its charter lien, when it knows he has divested himself of the title to his stock. *Bank of America* v. *McNeil*, 10 Bush, 54.

3. Holder of a note secured by a lien on land, releases his lien by accepting, in its stead, a note with personal security. (Ducker & Jones v. Gray, 3 J. J. Marshall, 163.) *Gaines, &c.* v. *Casey, &c.*, 10 Bush, 92.

4. In the settlement of an insolvent's estate, the securities will not be marshaled to the prejudice of the creditor holding an

advantage obtained by contract. (Logan v. Anderson, 18 B. Mon., 119.) *German Security Bank, &c.* v. *Jefferson, &c.*, 10 Bush, 326.

5. To create a lien for the purchase-price of chattels, as against a purchaser for a valuable consideration without notice, there must be a conveyance or mortgage to that effect, acknowledged and lodged for record. *Vaughn, &c.* v. *Hopson*, 10 Bush, 337.

6. The Commonwealth cannot be deprived of its right to prosecute its claim against any part or all of the estate bound by its judgment lien, until its debt is fully satisfied. *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

7. In a suit to foreclose a vendor's lien securing two notes, both owned by plaintiff, one of which is not due, it is erroneous to decree a sale subject to a lien for the second note. *Emison* v. *Risque*, 9 Bush, 24.

8. The decree should simply direct the sale of enough of the land to pay the debt and costs then adjudged, leaving the second note to its lien on the remaining portion of the land. *Emison* v. *Risque*, 9 Bush, 24.

9. For the satisfaction of lien notes, the court had jurisdiction to sell the land—independent of the lien attempted to be created by the attachment sued out by the holders of these notes: *Thomas* v. *Mahone*, 9 Bush, 111.

10. A. conveyed by deed real estate to B., retaining a lien thereon for $6,000 purchase-money. B. afterwards withdrew said deed from the clerk's office, where it had been lodged for record, and destroyed it; and on the same day A. conveyed the same land to C., a creditor of B.; and C. on the same day conveyed the said land to D. for $8,500. At the time of the destruction of said first deed, E. had an execution against B. in the hands of the sheriff, said execution being returned "no property." E. brought suit under section 474 of the Code against B., C., and D. *Held*—that C. was liable to E. to the extent of the $2,500 received by him. *Warner* v. *Bryant*, 9 Bush, 212.

11. Where a portion of the land attached was sold under order of court and satisfied the debt, the portion not so sold will be subjected to the satisfaction of prior liens on the entire

land; and if not sufficient, so much of the portion sold under the attachment will be subjected as is necessary to satisfy the residue. *Husbands* v. *Jones, &c.*, 9 Bush, 218.

12. A lien can not be created on the separate estate, by reason of any contract of the husband or wife anticipating the income, in any way so as to deprive herself and family of its beneficial use. *Young and wife* v. *Smith, &c.*, 9 Bush, 421.

13. A sheriff's bond, executed at another time than that required by law, creates no lien on the estate of the sheriff. *Hall* v. *Commonwealth, &c.*, 8 Bush, 378.

14. J. purchased two tracts of land, and a lien in the deeds reserved. Two of the notes of $500 each, for unpaid price of one of the tracts, were assigned to S.; and $1,000 unpaid on the other tract was assigned to L. J. conveyed to P. both tracts, he paying the whole price except $1,425 for which a lien was reserved. L. recovered judgment on his note, and took an assignment of the note for $1,425 on P. in payment thereof, paying excess to J. By accepting the note on P., L. did not waive his lien for his note for $1,000. *Lewis* v. *Pusey, &c.*, 8 Bush, 615.

15. Liens of insured property in unrecorded policies does not affect innocent *bona fide* purchasers. *Kentucky Farmers' Mutual Ins. Co.* v. *Mathers, &c.*, 7 Bush, 23.

16. Extension of time to redeem land sold under execution is not a waiver of the forfeiture of the right for the specified time, but a purchase by the creditor of land at execution sale for the benefit of the debtor creates a lien. *Ferguson's adm'x &c.* v. *Smith*, 7 Bush, 76.

17. Discharge in bankruptcy does not prevent creditors from enforcing liens in State courts. *Payne & Bro.* v. *Able, &c.*, 7 Bush, 344.

18. Sureties of a sheriff have no lien on money collected by him as sheriff, and paid over to other parties to whom he was indebted. *Clore, &c.* v. *Bailey*, 6 Bush, 77.

19. Liens reserved in a deed, not embraced by the statute regulating sales of encumbered property under execution. (Sec. 1, art. 15, chap. 36, Rev. Stat.) This is now altered by art. 14, sec. 1, chap. 38, Gen. Stat., 435; and the purchaser only acquires a lien. The cases in 4 Bush, 662; 6 Bush, 115; and 6 Bush, 321, are no longer the law.

20. Deed acknowledged payment of two-thirds of purchase money, and expressly retained a lien until all of the purchase money should be paid. Only one-third was paid. Vendor had a lien against vendee for all that remained unpaid. *Ledford, &c.* v. *Smith*, 6 Bush, 129.

21. If one creditor has a lien upon two funds, and another a lien upon but one of those funds, the former will be compelled to seek satisfaction out of the fund which the latter cannot touch. *Glass* v. *Pullen*, 6 Bush, 346.

22. Liens for less than $50 can be enforced by the circuit courts. *Bush* v. *Williams*, 6 Bush, 405.

23. Installments not due cannot be enforced by judgment for sale of the land. *Burton* v. *McKinney*, 6 Bush, 428.

24. Note barred by lapse of time. Lien by which it is secured cannot be enforced. *Yeates* v. *Weeden, adm'r*, 6 Bush, 438. (4 Bush, 538.)

25. Lien enforced, although by mistake the deed did not reserve it. *Phillips* v. *Skinner*, 6 Bush, 662.

26. Whenever—through the agency of either partner, or the insolvency or dissolution of the firm—a partnership creditor is brought in contact with a separate creditor of a member of the firm, equity gives the firm creditor a preference. (Story on Partnership, sec. 360; 3 Kent's Com., 65; 13 B. Mon., 411.) *Howell, Gano & Co.* v. *Commercial Bank of Kentucky*, 5 Bush, 93.

27. The assignee of a note secured by a lien, procures with it the lien by assignment. *Forwood* v. *Dehoney*, 5 Bush, 174.

28. Taking a note of debtor by a mechanic for work done does not waive his lien. *Gere and wife* v. *Cushing, &c.*, 5 Bush, 304. A *bona fide* mortgagee for a valuable consideration, without express or constructive notice, given according to the mechanic's lien law, is not affected by liens created by said enactment. (Myers' Sup., 305, sec. 12; 2 Dana, 204; 3 Met., 456.) *Same*, 304.

29. Execution levied on land before defendant's death creates a lien thereon, which gives priority over other claims against defendant's estate. *Burge's adm'r, &c.* v. *Brown, &c.*, 5 Bush, 535.

30. Attorneys have no lien before judgment on plaintiff's claim for unliquidated damages in tort. *Wood* v. *Anders*, 5

Bush, 601. (4 Bush, 13.) But see sec. 15, art. 1, chap. 5, Gen. Stat., 149.

31. Recital in a deed that the stock and R. R. bonds of the R. R. Co., had been received in consideration of the land, did not reserve a lien. *Keith, &c.* v. *Wolf, &c.*, 5 Bush, 646.

32. A partnership creditor's lien is paramount to attachment liens created on debts which are not partnership. *O'Bannon & Bashaw* v. *Miller & Hopkins*, 4 Bush, 25.

33. A landlord does not waive his lien by taking personal security for his rent. *Smith* v. *Wells' adm'x*, 4 Bush, 92.

34. Two notes were given by a third person to a third person for unpaid purchase price of land, which was fully recited in the deed. Did a constructive lien arise under sec. 26, chap. 80, 2 Stanton, 230? Court equally divided. *Pack* v. *Carder, &c.*, 4 Bush, 121.

35. By mistake and neglect of draftsman who was instructed to secure lien for the purchase-money, he failed to do so. Both parties thought it had been done. On the evidence of the draftsman, lien was enforced. This was between the original parties, but it applies also to volunteers. *Worley* v. *Tuggle, &c.*, 4 Bush, 168.

36. Pledgee must have actual or constructive possession of the thing pledged to give a lien. Property in transit may be pledged by delivery of the bills of lading. The title does not pass. Shippers of cotton drew drafts upon their consignees, and discounted them in bank by pledging the cotton; by delivery of the bills of lading therefor gave a lien to the banks superior to attaching creditors. *Petitt & Co.* v. *First National Bank of Memphis*, 4 Bush, 334.

37. Recital of what part of purchase price remains unpaid in the deed, is equivalent to an express lien; and no contemporaneous and collateral security can neutralize its effect. *Beyland* v. *Sewell and wife*, 4 Bush, 637. B. sold to S. and wife a tract of land, and took two notes of D. S. O., drawn by him to his own order, payable at the Ocean Bank, New York. The conveyance was made to Mrs. S., and recited the foregoing. *Held*—that B. had a lien on the land. *Same*, 637.

38. A sheriff who levies an execution, on land held jointly by the defendant and others who are minors, should not make

a sale, but return the facts. (2 Stanton's Rev. Stat., 513.) Although a sale and conveyance pass no title, yet the execution creditor acquires a lien, and may proceed by equitable proceedings to partition and subject to satisfaction the interest so levied on. *Payne* v. *Pollard, &c.*, 3 Bush, 127.

39. A vendor by executory contract does not waive his lien by taking personal security for the purchase money, or by renewing the notes with personal security. (6 B. Mon., 67.) *Lusk* v. *Hopper, &c.*, 3 Bush, 179.

40. Vendor cannot enforce lien where he does not show the terms of the contract, nor allege that he is able to convey according to the terms of the contract, nor that he has the legal title to the land. *Williams* v. *Abrahams*, 3 Bush, 186.

41. Ireland & Ford sold to Thornberry; he sold to Riley, and he to Moss. He gave his note to I. & F. for the amount Thornberry owed them on the land. Then Moss gave to Ireland & Ford separate notes for the amount due to them on the land. They then made a deed to Moss, and expressed that the consideration was paid. Ireland sued on his note, got judgment and execution, levied on the land, and at the sale purchased it. He and Ford thereby waived their lien, except under the execution levy. Berryman, assignee, held one of the notes on Riley, and one on Moss entitled to his lien notwithstanding Ireland & Ford's conveyance, and was prior to their lien—the conveyance to Moss, and acknowledgment of the receipt of the consideration being a fraud on Berryman. *Ireland* v. *Berryman*, 3 Bush, 357.

42. Conveyance set aside for constructive fraud. Rule of equity is to give preference for the actual outlay to the holder of the legal title. *Whitaker* v. *Garnett, &c.*, 3 Bush, 402.

43. By deed of Jan. 7, 1861, vendors recited "that in consideration of $350, bearing interest from Sep. 15, 1855, and $450 bearing interest from Nov. 10, 1855; this imported that the consideration was fully paid when the deed was made. *Ricketts' ex'r* v. *Lambert*, 3 Bush, 670.

44. Assignment of the title bond for conveyance of land: No lien exists for unpaid purchase money unless amount remaining unpaid is set forth in the assignment, or a lien is therein expressly retained. *Taylor* v. *Ford, &c.*, 1 Bush, 44.

45. Judgment under which land was sold, reversed and sale set aside. Purchaser has prior lien on the land for purchase money paid before the prosecution of the appeal. *Miller, &c.* v. *Hall and wife*, 1 Bush, 229.

46. Execution levied on land mortgaged, before the mortgage is recorded; but recorded after the levy, and before the sale. The mortgagees have priority over the execution purchaser. *Righter, &c.* v. *Forrester, &c.*, 1 Bush, 278.

47. Bill of discovery does not create a lien until the discovery is made by filing the answer. *Ward's adm'r* v. *Robinson, &c.*, 1 Bush, 294.

48. Acceptors of bills who hold property of the drawer to pay the bills, or for reimbursement, are lien creditors to the extent of the property so held. *Martin, Cobb & Co.* v. *Curd's adm'r*, 1 Bush, 327.

49. Conveyance by one partner to pay all his individual and partnership debts: The implied lien of the other partners and partnership creditors is prior, until all the partnership creditors are paid. *Bank of Kentucky* v. *Herndon, &c.*, 1 Bush, 359.

50. A party who pays a debt for which another has bound himself by a lien or mortgage on land, is substituted to the benefit of all the liens and securities created to secure the payment of the debt. *Wickliffe's ex'r, &c.* v. *Breckinridge's heirs, &c.*, 1 Bush, 427.

51. A lien created by the laws of Louisiana, in favor of a wife upon the estate and future acquisitions of the husband, will be enforced in Kentucky. *Kendall and wife* v. *Coons, &c.*, 1 Bush, 530.

LIFE ESTATES AND REMAINDERS.

1. Land devised to a wife, remainder to testator's children. A daughter died before the termination of the life estate. Her interest in the land descended to her children. Her husband was not tenant by the curtesy to that interest. *Moore, &c.* v. *Calvert, &c.*, 6 Bush, 356.

2. Testator devised to a trustee all his estate, for the use of his wife for life, and died intestate as to the reversion. A present interest in the reversion passed to his children. *Sansberry's*

ex'r v. *McElroy & Rinehart*, 6 Bush, 440. And a posthumous child at its birth became vested with an interest. *Same*, 440.

3. A deed to a woman and her present heirs gives her a life estate, with remainder to such children as were then living. Not being parties to the deed, the heirs cannot take any present interest in it, but take as remaindermen. *Foster* v. *Shreve, &c.*, 6 Bush, 519. (Webb & Harris v. Holmes, &c., 3 B. Mon., 404.) A deed to a woman and her children will give her a life estate, and her children then in existence and such as may be afterwards born, an estate in remainder in fee. (3 B. Mon., 404.) *Same*, 519.

LIMITATIONS.

1. See BILLS AND NOTES; CONTRIBUTION; JUDGMENT; and SURETIES.

2. Sec. 6 of the act of 1821 (1 M. & B., 302), and which was substantially the same as section 474 of the Civil Code, was in force in 1848 when the execution on the judgment against D. was returned; and gave S. a right of action against D., to subject to the satisfaction of that judgment any chose in action or legal or equitable estate belonging to D. This was a right of action accruing on the judgment, and was the only kind of action that could then or can now be maintained upon a judgment of a court of this State. And as that right of action accrued against D. while he was a resident of this State, and he, by departing therefrom, obstructed the prosecution of the action, the case falls within the provisions of section 9, article 4, chapter 63, Revised Statutes, and is thereby saved from the operation of section 1, of article 3, as amended by the act of 1865. *Davidson, &c.* v. *Simmons*, 11 Bush (Sept. 25, 1875).

3. The act of 1865 (Myers' Supplement, 295) did not provide that a judgment should be barred by the lapse of fifteen years without an execution having issued thereon. It only provided that no execution should issue; and left any right of action the plaintiff may have had upon the judgment, to be governed by the same rules applicable to other causes of action. S. having had a cause of action on the judgment, the prosecution of which was obstructed by the departure of D. from the State, we are of the

opinion that the statute is unavailing. *Davidson, &c.* v. *Simmons*, 11 Bush (Sept. 25, 1875).

4. An appeal not prosecuted for three years from date of judgment is barred by limitation. *Farlee, &c.* v. *Rodes*, 11 Bush (Oct. 1, 1875).

5. A defendant, constructively summoned,—against whom a judgment of foreclosure of mortgage was rendered more than five years before, but within five years after an order modifying the directions for advertising the sale, the sale itself, and the order confirming the sale—filed with the clerk a written motion to set aside the judgment and orders, and at the first ensuing term moved the court to the same effect, but filed no answer. The motion was overruled, and properly—because it should first be made to appear, by exceptions filed and sustained, that the order had been improperly made, before it could be set aside. (Civil Code, sec. 445.) *Williams, &c.* v. *Taylor, &c.*, 11 Bush (Oct. 2, 1875).

6. There need be no danger apprehended from purchase-money notes set forth in the deed from N. B. to M. B., being now nearly twenty-two years since the one for the last installment matured. *Bridgeford & Co.* v. *Beck, &c.*, 11 Bush (Nov. 12, 1875).

7. The temporary absence from the State of a debtor, engaged in the United States military service during the late civil war, did not obstruct his creditor from instituting a suit against him on his bond. (Ormsby v. Letcher, 3 Bibb, 269.) *Buckley* v. *Jenkins*, 10 Bush, 21.

8. A stale claim not barred by the statute is not enforced in this case. *Bettis* v. *Allen*, 10 Bush, 40.

9. That the action was not brought within a year after one of the infants arrived at age, is no bar to the rights of the others who sued within the prescribed time. *Allen, &c.* v. *Troutman's heirs*, 10 Bush, 61.

10. Though an action against an heir on the note of his ancestor can only be maintained by virtue of a statute, the "liability" of the heir is not statutory. The limitation of fifteen years applies, as in other actions on promissory notes. *Trustees of Kentucky Female Orphan School* v. *Fleming, ex'r, &c.*, 10 Bush, 234.

11. If a corporation can rely upon lapse of time, against a stockholder who merely demands the evidence of title to his stock (a question not decided), the statute will not begin to run until the stockholder is notified by some unequivocal act that his title to the stock is disputed. *Commonwealth for Mercer County Court* v. *Springfield, Maxville & Harrodsburg Turnpike Co.*, 10 Bush, 254.

12. Limitation runs against a stockholder as to dividends on his stock which have been appropriated by the corporation. *Ibid.*

13. In an action for breach of sheriff's bond, and to recover actual damages, the limitation as to the sheriff is fifteen years. *Royse* v. *Reynolds*, 10 Bush, 286.

14. An action upon a liability created by statute, or for a penalty or forfeiture, must be commenced within five years. (Rev. Stat., chap. 63, sec. 2, art. 3.) *Royse* v. *Reynolds*, 10 Bush, 286.

15. Actions against the Louisville and Nashville R. R. Co. for injuring stock, must be brought within six months after the injury. *Mortimer* v. *Louisville and Nashville R. R. Co.*, 10 Bush, 485.

16. In the courts of this State, its statutes—and not those of the State where the debt was to be paid—must control in matters relating merely to the remedy. *McDonald's ex'r* v. *Underhill's ex'r*, 10 Bush, 584.

17. Debtor absconded from Alabama and lived under an assumed name, for twenty-five years, in Kentucky, unknown to his creditors. *Held*—the statute did not prevent them from suing in this State. (Sneed v. Hall, 2 Marsh., 22; Wilson v. Koontz, 7 Cranch, 205.) *McDonald's ex'r* v. *Underhill's ex'r*, 10 Bush, 584.

18. Statutes of limitation should be literally construed. *Ibid.*

19. Where a testator instructed his executor to pay a certain debt barred by limitation, it was not a new promise to pay interest, and only the principal could be recovered. *Ibid.*

20. A new promise to pay a debt barred by the statute of limitation must be express, or an unqualified acknowledgment that the debt is a subsisting debt, which the party is willing to pay; and this promise or acknowledgment must be to the party or his agent. *Trousdale's adm'r* v. *Anderson*, 9 Bush, 276.

21. A new promise or unqualified acknowledgment to a stranger will not take the case out of the statute or constitute a good cause of action. *Ibid.*

22. The limitation of five years applies to an action upon the implied promise or assumpsit of defendant. *Bridges* v. *Reed*, 9 Bush, 329.

23. Where the petition alleges breaches of trust, whereby the trust-property, a railroad, was sold, and one of the directors of the corporation owning the road became the purchaser, and the prayer is that such purchase be held for the benefit of the corporation, and the property so purchased be declared to be held in trust for the corporation, etc: Such a suit is not for the recovery of real estate, or for relief on the ground of fraud, but is a suit to declare and enforce an implied or constructive trust, and will be barred in five years. In this case, the purchaser died within five years from the time of his purchase. This suit, brought within one year after administration, is not barred. *Covington and Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

24. Where an act is neither illegal nor wrongful, but by reason of it some injury afterward accrues, the statute runs only from date of injury. Where the act is wrong, the statute runs from its date. *Kinnison* v. *Carpenter, &c.*, 9 Bush, 599.

25. In actions for official or professional negligence, the cause of action is founded on the breach of duty which actually injured the plaintiff, and not on the consequential damages. *Ibid.*

26. Ignorance of one's rights will not prevent the statute of limitations from running. *Ibid.*

27. Five years' continued adverse possession of a stolen horse, by an innocent holder, under a claim of title, invests such holder with a good legal title; the statute will bar an action for his recovery. *Dragoo* v. *Cooper*, 9 Bush, 629.

28. The purchaser of a stolen horse acquires title, not by reason of purchase from the thief, but by virtue of continued possession under claim of title for more than five years before the institution of the action. *Ibid.*

29. The statute is not merely a bar to the remedy; it takes away the right, and invests it in the party having the adverse possession the requisite length of time. *Ibid.*

30. Suit to make defendant responsible as indorser of a bill: Amended petition filed afterwards, seeking to make him liable for fraudulently procuring and destroying the bill, more than five years after the transaction took place. Statute of limitations a good bar. *Hyatt* v. *Bank of Kentucky*, 8 Bush, 193.

31. "If not paid, I request indulgence," indorsed on a note about the time it was made, did not estop the defendant from relying on the statute in bar. After fifteen years have elapsed from the maturity of the note, without suit, the note is dead, and a new promise to pay does not authorize a suit on the note. If made within fifteen years after the obligation matures, it lengthens the validity of the note, and the statute runs from the date of the promise; and then the suit should be brought on the note. *Same*, 193.

32. A grantor remaining in possession under a verbal agreement, cannot avail himself of the statute of limitations. *Carpenter, &c.* v. *Carpenter*, 8 Bush, 283.

33. Actions against a railroad company for injuries to stock must be brought within six months. *O'Bannon* v. *Lou., Cin. & Lex. R. R. Co.*, 8 Bush, 348.

34. The right to abate a nuisance, or to recover damages for its continuance, may be barred by the usual analogous period of limitation. *West & Bro.* v. *Lou., Cin. & Lex. R. R. Co.*, 8 Bush, 404.

35. The heir or devisee may plead the statute against a creditor or personal representative. *Payne, &c.* v. *Pusey*, 8 Bush, 564.

36. If the parties agree that an account of the defendants should be applied to the plaintiff's notes sued on, the statute of limitations to it does not apply. *Wing, &c.* v. *Dugan*, 8 Bush, 583.

37. Although suit might have been brought against the defendant before he left this State and after his return, his absence for nine years obstructed the prosecution of a suit for that time, and should not be counted as part of the period within which the action might be brought. *Poston* v. *Smith's ex'r*, 8 Bush, 589.

38. The seven years' limitation in favor of sureties, does not apply to creditors holding mortgages or pledges made according

to the laws governing such securities. *Hobson, &c.* v. *Hobson's ex'r*, 8 Bush, 665.

39. Statute does not apply to express trusts. Defendant, by a letter twelve years before action brought, acknowledged that he had a certain amount of plaintiff's money in his hands, which he promised to pay. Limitation did not bar the action. *Clay's adm'x* v. *Clay*, 7 Bush, 95.

40. The statute applies to demands which are in their nature a lending or borrowing, or a deposit of money to be loaned out, for depositor's benefit. *Same*, 95.

41. When the tenant for life and remaindermen agree to sell the property, in order that the proceeds may be held for the ultimate benefit of the remaindermen, the transaction will constitute an express trust between the holder of the fund and those in remainder who will be entitled to it; and limitation does not begin to run until there has been open and express denial by the trustee of the rights of the *cestui que trust.* *Roberts* v. *Roberts*, 7 Bush, 100.

42. When the statute will commence running against an action for property unlawfully taken out of the State by soldiers, see *Buffington* v. *Ulen*, 7 Bush, 231; and *Reeves* v. *Trigg*, 7 Bush, 385.

43. The right of action of the indorser, against those who are bound before him on their implied liability to him, resulting from his payment of the bill, will not be barred until five years after the date of his payment. *Bowman* v. *Wright*, 7 Bush, 375.

44. Merchant tailors are merchants. An action on an account concerning the trade of merchandise between merchant and merchant is barred by five years, but against an ordinary customer in two years. Gen. Stat., 629, 631.

45. Surety paying the debt: His right of action accrues for each payment at its date; he may sue a joint surety separately or jointly with the principal, and the action will not be barred until five years after the payment. *Robinson* v. *Jennings*, 7 Bush, 630.

46. Surety of an executor, administrator, guardian, curator, or sheriff to whom a decedent's estate has been committed, shall be discharged from all liability as such to the distributee, devisee or ward, when five years have elapsed without suit, after the accru-

ing of the cause of action, and after said persons attain full age; but the *laches* of one shall not affect the right of another. Sec. 13, chap. 97, 2 Stanton's Rev. Stat., 400.

47. And the foregoing statute runs against married women, and is not qualified by chap. 63 of the Revised Statutes, so as to render the savings therein in favor of married women applicable in cases against sureties. *Priest, &c.* v. *Warren and wife*, 7 Bush, 633.

48. If the cause of action concerning personal estate accrues in the lifetime of claimant, his subsequent death does not stop the running of the statute; and the interval that elapses until administration is granted on his estate is not excluded in the computation of the time necessary to complete the bar. But if the cause of action accrues after his death, the statute does not commence to run until administration is granted. (1 Bibb, 181; 2 Bibb, 537; 3 Mon., 41; 13 B. Mon., 409.) *Hull* v. *Deatly's adm'r*, 7 Bush, 687.

49. Where a suit has been commenced within the time limited, and that expires, and the suit abates by the death of the plaintiff, if another suit be commenced within a year after the abatement it will be in time. (13 B. Mon., 409.) *Same*, 687. And if not revived within the year, the *lis pendens* will be lost. *Same*, 687. Plaintiff's representative must revive within the year (sec. 570, Civil Code.); and if steps are not taken to revive, it is stricken from the docket. Civil Code, secs. 557, 573.

50. It was alleged that the widow's right to dower was barred; and so adjudged. Failing to appeal for three years, her right was barred to the dower. *Dugan* v. *Massey, &c.*, 6 Bush, 81.

51. Action against an attorney on covenants to pay over money for notes placed in his hands for collection, not barred by five years after payment of the notes. *Ironton Rolling Mills Co.* v. *Ross' adm'r*, 6 Bush, 103.

52. On a contract to leave a legacy for services rendered and to be rendered, limitation does not commence to run until promisor's death. *Myles' ex'rs, &c.* v. *Myles*, 6 Bush, 237.

53. If the heirs are all under the age of twenty-one years, at the time the right of entry descended to them, they will not be barred until three years after the disability is removed from all; but if part are not under disability when the right descends, the

disability of the others does not prevent the statute from running against all. *Moore, &c.* v. *Calvert, &c.*, 6 Bush, 356.

54. A partial payment on a note, made before a bar by limitation, is a *prima facie* acknowledgment that the residue remains unpaid, and suspends the operation of the statute. *Hopkins, &c.* v. *Stout*, 6 Bush, 375.

55. Note barred by time: Lien by which it is secured cannot be enforced. *Yeates* v. *Weeden, adm'r*, 6 Bush, 438.

56. The right of action for conversion of personal estate being in the personal representative, the bar does not commence to run until administration is granted. *Pendleton's ex'r, &c.* v. *Pendleton's adm'r*, 6 Bush, 469.

57. A debt barred may be revived by a new promise, express or implied. *Gray, &c.* v. *McDowell, &c.*, 6 Bush, 475.

58. If defendant admits that the debt has not been paid, yet pleads and relies on the statute of limitations, it is a bar to the action if the action was barred by time at its commencement. *Same*, 475.

59. Suspension of the statute of limitations in Wolfe and other specified counties: Courts in said counties opened in the fall of 1865, and the suit was brought in April, 1868. Consequently the elision of time from the accrual of the action in 1862 to the opening of the courts was less than five years. *Trimble* v. *Vaughn, &c.*, 6 Bush, 544.

60. A surety in an obligation will be released by the seven years' limitation, although the debt in the meantime has been merged by a judgment and replevin bond. *Milliken* v. *Dinning*, 6 Bush, 646.

61. Statute of limitations must be pleaded by defendant in all actions unless the petition shows that the action is barred by time, and that the defendant is not within any of the exceptions mentioned in the statute. (2 Met., 146; 2 Bush, 555.) *Board* v. *Jolly*, 5 Bush, 86.

62. Husband sells wife's land, by deed in which she does not attempt to convey. Her right to recover is not barred until fifteen years after his death. *Stephens* v. *McCormick, &c.*, 5 Bush, 181.

63. Motions only, to recover damages against officers under art. 18, chap. 36, Rev. Stat., are barred by two years. (3 Bush, 568.) *Commonwealth for Peters* v. *Bosley, &c.*, 5 Bush, 221.

64. Merchant's account barred by limitation, Jan. 2, 1863; petition filed Dec. 30, 1862; summons issued Dec. 31, 1863. The issual of the summons was the commencement of the action, and the statute applied. *Butts* v. *Turner & Lacy*, 5 Bush, 435.

65. To support an allegation of a new promise, either an express promise must be proved, or such an acknowledgment as will imply a promise to pay. *Warren* v. *Perry*, 5 Bush, 447.

66. An unqualified acknowledgment, without more or less, will imply a promise; but whether an offer to pay in cattle or horses, implied an unconditional promise to pay, ought to have been left to the jury. *Same*, 447.

67. When the statute of limitations is pleaded, matters in avoidance may be relied on without a reply. (Civil Code, secs. 116, 117, 153.) *Harris* v. *Moberly*, 5 Bush, 556.

68. Filing a note before the commissioner, in a suit to settle up an estate of a decedent, will not prevent the statute from running in favor of a surety. *Same*, 556.

69. In an action under the statute for seduction, the limitation of one year runs from the act of seduction; but in an action by the parent for the loss of service occasioned by the seduction, the limitation runs from the recovery of the daughter after the child's birth. *Wilhoit* v. *Hancock*, 5 Bush, 567.

70. Statute does not commence to run against a surety from the time of replevying, but from the time he pays the debt. *Hikes* v. *Crawford & Long*, 4 Bush, 19.

71. Payment of a debt barred by the statute of limitation cannot be recovered back on the plea of mistake of law or fact, where there was an honorary obligation to pay. *Hubbard* v. *City of Hickman*, 4 Bush, 204.

72. An injunction cannot be sued out against the creditors of an estate more than three years after the qualification of the personal representative. *Offutt's ex'x* v. *Bradford, &c.*, 4 Bush, 413.

73. Act of May 31, 1865, Myers' Sup., 295, is constitutional, amending chap. 63 on Limitations, Rev. Stat. *Vandiver, &c.* v. *Hodge, adm'r*, 4 Bush, 538.

74. Where the debt is barred by limitation, the lien to secure it is also barred. *Same*, 538.

75. Thirty years is the limit within which an action to recover real property must be brought. (Rev. Stat., sec. 5, art. 1, chap. 63, 2 Stanton, 124.) *Conner and wife* v. *Downer, &c.*, 4 Bush, 631.

76. The action to recover for a deficiency in a tract of land should be brought within five years of the date of sale, or within five years after the deficiency or mistake was discovered. *Dye* v. *Holland*, 4 Bush, 635. (12 B. Mon., 271.)

77. Where the statute commenced running against the ancestor in his lifetime, it will continue to run against his infant heirs who take the land under the will as purchasers and not by descent. *Patterson, &c.* v. *Hansell, &c.*, 4 Bush, 654. All the plaintiffs must be under disabilities to prevent the statute from running. When the tenant relies on the seven years statute, it does not begin to run until he has acquired a title, legal or equitable, deducible from the Commonwealth. *Same*, 654.

78. A conveyance of land upon a promise to pay to others, at grantor's death, certain sums, although in parol, the statute does not begin to run until after the grantor's death. *Mason, &c.* v. *Mason, &c.*, 3 Bush, 35.

79. Statute does not run against infants, married women, or persons of unsound mind. *Anderson, &c.* v. *Layton, &c.*, 3 Bush, 87.

80. If the time constituting the bar is permitted to elapse between the time of suing out one process until another, the bringing of the suit will not prevent the running of the statute to prevent the bar. *Clark* v. *Kellar*, 3 Bush, 223.

81. Sec. 11, chap. 95, Rev. Stat.—providing for the release of sureties in bonds having the force of judgments, when the plaintiff fails for a year to sue out execution—applies only to bonds to beneficial creditors who alone may control the collection by execution, and have the right to forbear or enforce the collection. *Barbee* v. *Pitman*, 3 Bush, 259.

82. Limitation does not commence to run against the sheriff's right of action for indemnity against the deputy and his sureties until judgment is rendered against the sheriff, nor is his claim barred till seven years after the judgment is rendered against him. *Bottom, &c.* v. *Williamson*, 3 Bush, 521.

83. Enjoyment of dower as laid off for twenty years bars the right to have it corrected. *Hibbs, &c.* v. *Evans*, 3 Bush, 661.

84. In 1834, land was given by the State to Calloway county for the endowment of seminaries of learning. In 1842, Marshall county was established out of the territory of Calloway, and one-half of the land was required to be transferred to Marshall county. *Held*—that the claim of Marshall county was not barred by the statute of limitations. *Marshall Co. Court* v. *Calloway Co. Court*, 2 Bush, 93.

85. Action to recover damages against the owners of the Lexington and Covington R. R. Co., for negligently causing death of decedent in the streets of Covington, brought by the administrator more than one year after he was qualified, was barred by limitation. The act of Feb. 17, 1866, Myers' Sup., 724, did not apply to such actions. *Fleming's adm'r* v. *Ernst, &c.*, 2 Bush, 128.

86. The lapse of fifteen years without issuing another execution, will bar any further proceedings on the judgment. *Lockhart* v. *Yeiser & Co.*, 2 Bush, 231.

87. To sustain a demurrer to a petition—upon the ground that it discloses a bar to the action by lapse of time or statute of limitations—the petition must show the non-existence of any ground of avoidance. *Rankin* v. *Turney*, 2 Bush, 555.

88. The statute does not apply to an attorney until there is a demand and refusal to pay over. *Roberts* v. *Armstrong's adm'r*, 1 Bush, 263.

89. The Revised Statutes, sec. 2, art. 1, chap. 63, 2 Stanton, 127, reduced the limitation in actions for real estate from twenty to fifteen years, after the Rev. Stat. took effect. The act of Feb. 4, 1858, extended it to all cases in which the right accrued, whether before or after the Rev. Stat. took effect. *Gibson* v. *Belcher*, 1 Bush, 145.

90. Where the right to an appeal is barred by statute, neither the modification or repeal of the statute will be construed to extend the time of taking an appeal without express provision to that effect. *Cassity* v. *Storms, &c.*, 1 Bush, 452.

91. Five years will bar a recovery from the principal, by a surety, for money paid by him for the former. *Joyce* v. *Joyce's*

adm'r, 1 Bush, 474. The surety may cause himself to be substituted to all the rights and remedies of the creditor whose debt he pays by contract with him or by an assignment of the judgment under sec. 8, chap. 97, Rev. Stat., 2 Stanton, 398; but if the assignment be made five years after the payment, it will not elude the bar. *Same*, 474.

92. The statute to be available must be pleaded. In an action to set aside a fraudulent conveyance, the plea of the statute is not good, unless more than five years have elapsed from the discovery of the fraud. *Hieronymous, &c.* v. *Mayhall, &c.*, 1 Bush, 508.

LIS PENDENS.

1. *Lis pendens* is lost as to a purchaser for a valuable consideration without notice, if the action for personalty is not revived within a year. *Hull* v. *Deatly's adm'r*, 7 Bush, 687.

2. Purchaser of land under execution, after the institution of a suit to subject the land in the circuit court, is a *lis pendens* purchaser. *Bush* v. *Williams*, 6 Bush, 405; *Salter, &c.* v. *Salter's creditors, &c.*, 6 Bush, 624.

3. A delay of nearly two years, without a step taken in the case, or a motion made indicating an intention to prosecute the suit, without any excuse given for the delay, deprives the plaintiff of the benefit of a *lis pendens*. *Petree & Bristow, &c.* v. *Bell, &c.*, 2 Bush, 58.

4. A collusive release, obtained *pendente lite*, can be of no avail. *Cain* v. *McHarry*, 2 Bush, 263.

5. A purchaser of land, while a suit is pending in another county to enforce a lien upon it in a court having jurisdiction, is a *pendente lite* purchaser. To constitute a *lis pendens*, process must be served as to strangers. A sale of the subject of litigation pending the suit, makes the purchaser a *lis pendens* purchaser, and not a necessary party to the suit. A party who pays a debt as surety, is substituted to the liens of the creditor created for securing the debt. *Wickliffe's ex'r, &c.* v. *Breckinridge's heirs, &c.*, 1 Bush, 427. (Lyle v. Bradford, 7 Mon., 116; Thomas v. Southard, 3 Dana, 480.

LOST RECORDS.

In this case, an appeal had been prosecuted to the court of appeals. Affidavit of the clerk disclosing the facts, and notice to defendants, being filed, court allowed plaintiff, on motion, to file a transcript of the record in the case as filed in the court of appeals to replace the papers that had been lost. *Held*, to be proper. *Oppenheimer* v. *Riley*, 6 Bush, 118.

LOTTERY.

See PUBLIC LIBRARY; and ILLEGALITY OF TRANSACTION.

MALICIOUS PROSECUTION.

1. See DAMAGES (9 Bush, 738).

2. In actions for malicious prosecution, malice must be proven, if denied. *Ullman, &c.* v. *Abrams*, 9 Bush, 738.

MANDAMUS.

1. See CORPORATIONS.

2. Courts of equity can not enjoin courts of law from proceeding, where they have jurisdiction. A railroad company obtained a writ of mandamus to compel the judge of a county court to issue the county's bonds, in compliance with a subscription for stock; and before he had complied, certain tax-payers sued in equity and enjoined him from issuing the bonds, but did not enjoin the company from enforcing the writ. *Held*—the court issuing the *mandamus* had the right, and could not refuse, to enforce obedience to it. *Cumberland & Ohio R. R. Co.* v. *Judge of Washington County Court*, 10 Bush, 564.

3. Under our Civil Code, we have no other than peremptory writs of *mandamus*. The order granting or refusing the writ is the final order in the proceeding. (Civil Code, secs. 523, 524.) *Ibid.*

4. The writ of mandamus is an order of a court of competent jurisdiction—commanding an officer to do, or omit to do, an act,

the performance or omission of which is enjoined by law. *Cooke* v. *College of Physicians and Surgeons, &c.*, 9 Bush, 541.

5. A mandamus will not lie against a private corporation, or its officers, having no right to exercise any power of a public nature. *Ibid.*

6. Mandamus is confined in its application to certain classes of persons; and the courts can not extend it to others. *Ibid.*

7. The College of Physicians and Surgeons of the city of Louisville can not be reached by mandamus. *Ibid.*

8. The mayor of Louisville may be compelled by mandamus to issue and sell the bonds of the city, to pay for land condemned for city purposes. *Duncan, trustee, &c.* v. *Mayor of Louisville*, 8 Bush, 98. And the Jefferson court of common pleas has jurisdiction to issue the mandamus. *Same*, 98.

9. Mandamus is the proper remedy to compel a county court to issue bonds in pursuance of county subscriptions. *Shelby Co. Court* v. *Cumberland & Ohio R. R. Co.*, 8 Bush, 209. In such a proceeding, the correctness of the judgment of the county court —that the conditions of the propositions voted for, had been complied with, so far as to authorize the subscription of stock— cannot be questioned. *Same*, 209.

10. Board to examine poll-books may be compelled by mandamus to issue a certificate of election to the party who may be entitled to receive it. *Clark* v. *McKenzie, &c.*, 7 Bush, 523.

11. The plaintiff alleges that he was employed by the superintendent to do the work, and does not disclose that the contract was not in writing. It must be presumed that the officers did their duty, in the absence of facts to sustain the contrary conclusion. *Haly* v. *Auditor*, 4 Bush, 490.

12. It is the proper remedy, to compel the county court to levy a county tax, to pay a medical bill for medical services, to a negro woman afflicted with small-pox, under employment of the county judge. *Rodman, &c.* v. *Justices of Larue County*, 3 Bush, 144.

13. The fact that the auditor has gone out of office and his successor has qualified, presents no defense. The change should be suggested on the record, and the action proceed against his successor. If the law does not require that the account should be itemized, the secretary's certificate of its correctness, until

otherwise shown, must be presumed to be right. *Lindsey* v. *Auditor of Kentucky*, 3 Bush, 231.

MANDATES OF THE COURT OF APPEALS.

The court of appeals has power, by rule against an inferior court, to enforce obedience to its mandates. (Civil Code, sec. 902; 6 B. Mon., 638.) The chancellor has no power, even for good cause, to suspend it. *Watson, &c.* v. *Avery, &c.*, 3 Bush, 635.

MARRIAGE.

1. See HUSBAND AND WIFE (9 Bush, 696).

2. The children of negroes who, while slaves were married according to the custom among negroes, and continued to live together as man and wife until the husband's death, are legitimate, and are the legal heirs to real estate left by their father. The legislature did not intend, by the confused statute of Feb. 14, 1866, to make them bastards. *Whitesides, &c.* v. *Allen, guardian, &c.*, 11 Bush (March 10, 1875).

3. Free persons of color, who cohabited as man and wife, and held themselves out to the world as such before the Revised Statutes took effect, constituted them husband and wife. *Ewing* v. *Bibb, &c.*, 7 Bush, 655. Such a marriage is binding so far as to make a second marriage void. *Same*, 655.

4. If the parties believed that the person solemnizing the marriage has authority to do so, that will make the marriage valid. *Robinson* (*of color*) v. *Commonwealth*, 6 Bush, 309.

5. Marriage valid where celebrated, valid everywhere. Mere cohabitation, or behavior towards each other as husband and wife, affords an inference that the parties have been married. The law presumes the offspring of cohabitation to be legitimate; and this presumption is not rightly repelled by a mere balance of probabilities. The evidence to repel it must be strong, satisfactory, and conclusive. Actual marriage and subsequent recognition would legitimate a child born before marriage. *Dannelli, &c.* v. *Dannelli's adm'r*, 4 Bush, 51.

6. Since the adoption of the Revised Statutes, there can be no such thing as a legal marriage in Kentucky by cohabitation and recognition alone; and all marriages not solemnized or contracted in the presence of an authorized person or society are void. *Estill* v. *Rogers*, 1 Bush, 62.

MARSHALING SECURITIES.

In the settlement of an insolvent's estate, the chancellor will not marshal the securities to the prejudice of a creditor holding an advantage obtained by contract. (Logan v. Anderson, 18 B. Mon., 119.) *German Security Bank, &c.* v. *Jefferson, &c.*, 10 Bush, 326.

MASTER COMMISSIONER.

1. The master commissioner of a court may be removed by the chancellor at will, without cause. *Dunlap* v. *Kennedy*, 10 Bush, 539.

2. A master commissioner is entitled by law to three dollars per day, for each day he shall be necessarily employed, to be ascertained by his oath and other evidence. *Underwood* v. *Dickinson*, 8 Bush, 337.

MASTER AND SERVANT.

See DAMAGES.

MERGER.

Whenever a greater or less estate meet in the same person, without any intermediate estate, the less is immediately merged into the greater. (2 Blackstone, 177; 4 Kent, 103.) *Fox* v. *Long*, 8 Bush, 551.

MILITARY AUTHORITY.

1. Color of military authority is not sufficient to excuse those who participate in shooting citizens. *Edgerton* v. *Commonwealth*, 7 Bush, 142.

2. To excuse military impressment, there must not only be military necessity, but it must be so imminent as not to admit of delay. *Sellards, &c.* v. *Zomes*, 5 Bush, 90. (1 Bush, 461; Same, 40; 13 Howard, 115.)

3. Impressment for the purpose of undertaking an enterprise, expedition, or recruiting service cannot be justified; and a soldier who takes a horse for either of these purposes is liable to the owner, although he was directed to recruit and mount soldiers. *Ferguson* v. *Loar*, 5 Bush, 689.

4. Orders of an acting quarter-master do not justify forcibly taking possession of property and destroying it without compensation to the owner. *Hogue* v. *Penn*, 3 Bush, 663.

5. The title to personal property by capture is perfect, as soon as it is in the firm possession of the captor. Horses captured by the state troops became the property of the state; and a party who sold a horse branded U. S. is not liable on his implied warranty of title thereby, because a U. S. inspector of horses seized him. *Richardson* v. *Tipton, &c.*, 2 Bush, 202.

6. A Confederate quarter-master who, acting under the order of his commanding general, took money by force out of the Bank of Hopkinsville, is liable personally for all the consequences of his own unjustifiable act. *Terrill* v. *Rankin*, 2 Bush, 453.

7. An order of the Secretary of War of the U. S. commanding the aiding of slaves in Kentucky to escape from their masters, if issued, would not shield one who obeyed it from the penal consequences of his crime. *Commonwealth* v. *Palmer*, 2 Bush, 570.

8. When the defendant presented to the state court a case in which he had a right of transfer to the U. S. court, the state court should proceed no further with the case, and the transfer should be made. *Edwards* v. *Ward*, 2 Bush, 606.

9. Letters from the district provost marshal to the county provost marshal, ordering a seizure of private property, do not justify such seizure. *Jones* v. *Commonwealth*, 1 Bush, 34.

10. To justify a military commander to seize and destroy, or appropriate, private property, he must show an actual emergency for doing so. *Farmer* v. *Lewis, &c.*, 1 Bush, 66.

11. A citizen with whom a Confederate officer left a horse, in lieu of one taken by him, acquired a valid title to him as against the U. S. *Cessna* v. *Thurman*, 1 Bush, 292.

12. To entitle a party to the removal of a case to the United States court from the state court, must show that his defense comes strictly within and is embraced by the provisions of the act of Congress. (Sec. 5, act of Congress 3d March, 1865.) *Short* v. *Wilson*, 1 Bush, 350.

13. A paroled prisoner, denuded of all belligerent rights of capture, had no authority to take mules for Confederate use. *Beck* v. *Ingram*, 1 Bush, 355.

14. Capture of horses for the public use of the Confederate army was excusable, as a lawful exercise of a belligerent right. *Price, &c.* v *Poynter*, 1 Bush, 387.

15. A horse branded U. S., when held in private hands for three years as private property, was not sufficient evidence that the horse was the property of the Government. *Lewis* v. *King*, 1 Bush, 419.

16. No citizen or soldier can shield himself from responsibility for an act done, by pleading an unconstitutional order of the President of the United States authorizing the act complained of. *Eifort, &c.* v. *Bevins*, 1 Bush, 460.

17. The occupation of Bowling Green and surrounding country by the Confederate army, and the installation of a temporary civil government under its military cover, suspended within their potential range the government and laws of Kentucky, and not only compelled but legalized submission to its authority. *Baker* v. *Wright, &c.*, 1 Bush, 500.

18. To permit a party, who received and used within the Confederate lines Confederate currency, to escape from his obligation, would be to legalize robbery. *Martin* v. *Hortin, &c.*, 1 Bush, 629.

MISDEMEANORS.

1. See CRIMINAL LAW AND PROCEEDINGS; and INDICTMENTS.

2. The only statute imposing penalties for selling, etc., liquors to minors, is the act of March 22, 1871. *Baer* v. *Commonwealth*, 10 Bush, 8.

3. The jurisdiction of the court of appeals in misdemeanor cases is limited to those where the fine exceeds $50 or imprisonment for thirty days, or both. (Act of March 1, 1860.) *Baer* v. *Commonwealth*, 10 Bush, 8.

4. Appeal from judgment of acquittal can not be prosecuted by the attorney general, in misdemeanor cases. *Commonwealth* v. *Dobbins*, 9 Bush, 1.

MISFEASANCE IN OFFICE.

See GUARDIAN AND WARD; and COUNTY JUDGE.

MISTAKE.

1. A contract made under a mistake of facts is voidable. But where each party has equal means of information, or where the fact is doubtful and the parties have acted in entire good faith, a court of equity will not interfere. (Story's Eq., 156; Kerr on Fraud and Mistake, 408.) *Instance*—Two banks, defrauded by two persons supposed to be the same, agreed to unite in an effort to capture the supposed thief, to divide the expense, and share any money recovered. One being captured with the sum taken from the bank he defrauded, it was *held* that this bank could not be relieved from the agreement. *Western German Savings Bank* v. *Farmers and Drovers' Bank*, 10 Bush, 669.

2. Where there was a mutual mistake as to the existence of oil on the lessor's land, equity will release the lessee from the performance of the covenants in the lease. *Bell* v. *Truitt*, 9 Bush, 257.

3. An appeal bond by mistake was executed superseding the personal judgment. The court permitted another to be substituted, superseding the judgment, sustaining the attachment, and subjecting the attached property. *Held*—to be correct. *Ross, &c.* v. *Wilson, Peter & Co.*, 7 Bush, 29.

4. The holder of a note has no right to alter it, except to make it conform to what all the parties to it agreed or intended it should have been. (15 Maine, 357; Parsons on Bills and Notes, 569, 570, 571.) *Duker* v. *Franz*, 7 Bush, 273.

5. When two or more persons have suffered loss by mutual mistake, the court will not shift the entire loss upon one, unless it can be shown that he was in some degree responsible for the existence of the mistake. *Hopkins' ex'r* v. *Commonwealth for use of Shipp, &c.*, 7 Bush, 644.

6. The mistake must constitute a material ingredient in the contract of the parties, and disappoint their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law on the conscience of either party; and then the mistake must be clearly made out by proof. (1 Story's Equity, sec. 157; Worley v. Tuggle, 4 Bush, 168.) *Graves* v. *Mattingly*, 6 Bush, 361.

7. A lien will be enforced, if by mistake the deed was so drawn as to reserve a lien under the statute. *Phillips* v. *Skinner*, 6 Bush, 662.

8. A father intending to convey land to his married daughter and heirs of her body, through mistake conveyed it to her husband, was corrected after death of both grantor and grantee. In such a case, the mistake must be established, not be a mere inference from the weight of evidence. *Mattingly and wife* v. *Speak, &c.*, 4 Bush, 316.

9. One witness is sufficient to establish a mistake; even against the denials of the defendant's answer. (Civil Code, sec. 142; 17 B. Mon., 644; 1 Met., 354.) *Worley* v. *Tuggle, &c.*, 4 Bush, 168.

MONEY IN COURT.

Money, although wrongfully obtained, being produced to the court when claimed by more than one party, the court—where the pleadings and evidence will admit of it—should permit the jury to find a general verdict, and order the money to be paid over accordingly. *Davis* v. *Watkins, &c.*, 2 Bush, 224.

MORTGAGES.

1. See ASSIGNMENTS; ASSIGNMENTS UNDER THE ACT OF 1856; and CORPORATIONS.

2. Acceptance of a mortgage essential to its validity; so, also, is delivery. Sec. 11, chap. 24, of Revised Statutes, does not dispense with delivery. *Bell* v. *Farmers' Bank, &c.*, 11 Bush (Feb. 15, 1875).

3. A prior equity with a legal advantage will not be disturbed in favor of a junior equity not more meritorious. (Russell v. Petree, 10 B. Mon., 186.) *Bettis* v. *Allen*, 10 Bush, 40.

4. A stale claim not barred by the statute of limitations is not enforced in this case. *Bettis* v. *Allen*, 10 Bush, 40.

5. The mortgage of a "homestead interest" was no conveyance of the legal estate, but of the homestead exemption only. *Gaines, &c.* v. *Casey, &c.*, 10 Bush, 92.

6. Whenever the debtor ceases to be a housekeeper or removes from the premises, the right to the exemption terminates, though mortgaged. *Gaines, &c.* v. *Casey, &c.*, 10 Bush, 92.

7. Agreement to pay attorney's fee in a mortgage or note if sued on, is against public policy, usurious, and will not be enforced. *Thomasson* v. *Townsend*, 10 Bush, 114.

8. Penalties will not be enforced, when compensation can be made. (Story's Eq., 1314.) *Thomasson* v. *Townsend*, 10 Bush, 114.

9. A debtor may mortgage a portion of his estate to secure a debt, or make payment thereof, though unable to pay all his debts; and such mortgage or payment will be respected by courts of equity unless attacked under the statute of 1856. *German Security Bank, &c.* v. *Jefferson, &c.*, 10 Bush, 326.

10. Where, by the the terms of a lease, the crop to be grown on the leased premises was pledged for the payment of the rent, the landlord's claim cannot avail against the exemption rights in favor of the tenant's family. (Ross, &c. v. Wilson, Peter & Co., 7 Bush, 29.) *Vinson* v. *Hallowell, &c.*, 10 Bush, 538.

11. A mortgage of a crop to be raised on a farm passes no title, if the crop was not sown when the mortgage was executed; and the mortgagee has no claim against a purchaser of the crop, for it or its value. *Hutchinson, McChesney, &c.* v. *Ford*, 9 Bush, 318.

12. A mortgage of a growing crop of tobacco by an insolvent debtor does not operate as an assignment for the benefit of all

of his creditors under act of March 10, 1856. *Brewer & Orr* v. *Cosby*, 8 Bush, 388.

13. A married woman may mortgage her estate to secure the prior debt of her husband. (2 Met., 235; 2 Met., 503; 5 Bush, 396.) *Hobson, &c.* v. *Hobson's ex'r*, 8 Bush, 665. Such a mortgage becomes a security or pledge, and can be enforced in an action instituted more than seven years after the cause of action accrued. *Same*, 665.

14. Where the debt still subsists, or it is a loan and is a personal liability on the part of the borrower to repay it, and upon payment of the debt the property is to be reconveyed by the grantee, it is a mortgage; but where the relation of debtor and creditor never existed or is extinguished, then a similar agreement will be considered a conditional sale. *Honore* v. *Hutchings*, 8 Bush, 687.

15. The general rule is, that at law a grant or mortgage of property to be acquired in future, is void. If it can be upheld in equity, it is only valid as a contract to assign when the property shall be acquired. *Ross, &c.* v. *Wilson, Peter & Co.*, 7 Bush, 29.

16. Whatever equitable rights the mortgagee acquired against the mortgagor—by the attempt to mortgage the goods, etc., afterwards to be acquired—such mortgagee derived no available right to such subsequently acquired property as against the creditors of the mortgagor. (Hilliard on Mortgages, chap. 43; 1 Parsons on Contracts, 570; Story's Equity, sec. 1040; 8 Barbour, 102; 11 Met., Mass., 481.) *Ross, &c.* v. *Wilson, Peter & Co.*, 7 Bush, 29.

17. Where the clerk certifies that the mortgage was acknowledged before him, and it appears by the proof that the deed was not read and explained to the wife, and the husband was present when her acknowledgment was taken by the clerk, the mortgage of the wife's land was void. *Woodhead, &c.* v. *Foulds, &c.*, 7 Bush, 222.

18. A note secured by mortgage, being executed by the obligors to the payee to secure money to be advanced by him, or to be negotiated by him as security for money borrowed for a specific purpose, is binding on the obligors; and third parties who loaned the money on the faith of the note and mortgage

may enforce the collection of the note and foreclose the mortgage. (14 Ben. Mon., 283; 1 Duvall, 13.) *Baker* v. *Ward*, 7 Bush, 240.

19. Mortgage executed ten days before petitioner filed his petition in bankruptcy, void. Mortgagees being parties to the suit in bankruptcy, are bound by the judgment in the case in the Federal court. *Whipps, &c.* v. *Ellis, &c.*, 7 Bush, 268.

20. A married woman derived title to land by will, which prohibited her from disposing of it by deed, gift or sale, for a specified time. The prohibition upheld. *Stewart* v. *Barrow*, 7 Bush, 368.

21. A note being barred by lapse of time, the lien by which it is secured cannot be enforced. *Yeates* v. *Weeden, adm'r*, 6 Bush, 438. (4 Bush, 538.) A party claiming the benefit of the homestead exemption will be presumed to be white. 6 Bush, 448.

22. Mortgage of homestead is invalid, if the mortgagor has a wife and does not subscribe and acknowledge the mortgage. *Thorn* v. *Darlington*, 6 Bush, 448.

23. A *bona fide* mortgagee, for a valuable consideration, must be regarded as a *bona fide* purchaser, under sec. 12 of the "mechanics' lien law" (Myers' Sup. 305). *Gere and wife* v. *Cussing, &c.*, 5 Bush, 304.

24. Where an execution creditor has an execution levied on mortgaged land, and has it sold and bids it off himself, and thereby satisfies the execution: The subsequent foreclosure and sale of the mortgaged property in equity, which leaves him nothing, does not entitle him to set aside the levy and sale under his execution. *Thomas, &c.* v. *McKay*, 5 Bush, 475.

25. Carlisle indorsed paper in Kentucky, to a citizen of Kentucky, which, by the laws of Ohio, were bills of exchange, but by the laws of Kentucky were only promissory notes. His mortgage, made to secure his contingent liability as indorser, was not enforced because the assignee had not used due diligence, according to the laws of Kentucky, to coerce the notes from the obligors. *Carlisle, &c.* v. *Chambers*, 4 Bush, 270.

26. A mortgage, describing debts as a note or notes to C. S. for about $350, and N. S. an account for about $50, cannot be construed as including six notes to C. S. for $350 each, and ac-

counts to N. S. exceeding $900. *Storms, &c.* v. *Storms, &c.*, 3 Bush, 77.

27. The authority in a charter of a bank to take mortgages as security for money loaned, and to dispose of the same as agreed upon by the parties, in all respects as natural persons may do under the common law, so far abrogates the statute requiring mortgaged property to be sold by a decree of court. *Hahn* v. *Pindell*, 3 Bush, 189.

28. A party who advances money for necessaries, and to pay off encumbrances, for a person mentally incompetent to contract, is entitled to be paid his advances and be subrogated to the rights of the encumbrancer. *Coleman, &c.* v. *Frazer, &c.*, 3 Bush, 300.

29. Mortgages made to secure debts created simultaneously therewith, although done in contemplation of insolvency, are not denounced by the statute; but to secure prior debts, however small, operates as an assignment for the benefit of creditors generally. *Whitaker* v. *Garnett, &c.*, 3 Bush, 402. If both kinds of debts are included, those created simultaneously are entitled to preference. *Same*, 402.

30. After forfeiture of a mortgage of personal property, the mortgagee can take possession of it peaceably, or by action for its recovery according to the common law. If he take possession before forfeiture, he is liable for the value of the right of possession until the forfeiture. If the mortgagee be sued, he may, under sec. 126, Civil Code, plead his mortgage as a counter claim. (Swigert & Shreve v. Thomas, 7 Dana, 226.) *Brown* v. *Phillips*, 3 Bush, 656.

31. Land conveyed to a woman for life, and at her death to the issue of herself and husband, and if none, to her heirs and devisees; and if she dies before her husband, to revert to him and his heirs: On a foreclosure of a mortgage by the husband and wife, the life estate of the wife and reversionary interest of the husband should be sold. *Bowen* v. *Sebree and wife*, 2 Bush, 112.

32. A mortgage, executed during the war, by a citizen of Tennessee to a citizen of Kentucky, was illegal and void. *Hyatt* v. *James' adm'r, &c.*, 2 Bush, 463.

33. Under the act of March 10, 1856, the contingent liability of a surety does not constitute him a creditor; and a mortgage made to him in contemplation of insolvency, is not liable to be attacked. *Davis* v. *Gardiner & Co.*, 1 Bush, 272.

34. A purchaser under a *fi. fa.*, levied on mortgaged property not of record but recorded before the sale, takes subject to the lien of the mortgagees. *Righter, &c.* v. *Forrester, &c.*, 1 Bush, 278.

35. Mortgagor is not estopped from asserting his right of redemption, notwithstanding he directed the property to be levied on by the sheriff, and was present at the sale, and made no mention of the encumbrance. (2 Met., 197.) *Sandford* v. *Farmers' Bank of Ky.*, 1 Bush, 335.

36. A party who pays a debt for which another has bound himself by a lien or mortgage on land, is substituted to the benefit of the liens and securities thus created to secure the payment of that debt. *Wickliffe's ex'r, &c.* v. *Breckinridge's heirs, &c.*, 1 Bush, 427.

MOTIONS.

Motions to remove suits from state courts to the United States circuit court, must be made before "final trial or hearing" in the state court. *Hall & Long* v. *Ricketts*, 9 Bush, 366.

MUNICIPAL CORPORATIONS.

See TOWNS AND CITIES.

NATIONAL BANKS.

National bank can have no lien on its stock for the debt of the stockholder. (The Bank v. Lanier, 11 Wallace, 369; Bullard v. Bank, 18 Wallace, 589.) *Second National Bank of Louisville* v. *National State Bank of New Jersey*, 10 Bush, 367.

NEGLIGENCE.

1. See BANKS (9 Bush, 609); CRIMINAL LAW AND PROCEEDINGS; DAMAGES; and TOWNS AND CITIES.

2. A petition which asks for damages for the negligence of a druggist's clerk, who, in attempting to fill a physician's prescription, put up croton oil instead of linseed oil, and thereby caused great suffering and agony to the patient who took it, and did him serious and irreparable injury—presents a good cause of action, and was improperly dismissed. The right of action survives to his personal representative. *Hansford's adm'x* v. *Payne & Co.*, 11 Bush (Oct. 4, 1875).

3. The right of action for injuries affecting life, discussed. *Hansford's adm'x* v. *Payne & Co.*, 11 Bush (Oct. 4, 1875).

4. A recovery of punitive damages for the destruction of the life, will bar any other action for the injury or any of its consequences; and if a party elects to sue, and enforce the right of action that survives to him, he will not be allowed afterwards to avail himself of the benefits of the punitive statute, and also to recover under its provisions. *Hansford's adm'x* v. *Payne & Co.*, 11 Bush (Oct. 4, 1875).

5. To authorize a recovery in actions growing out of personal injuries, ultimately resulting in death, there must be an appreciable interval between the infliction of the injury and death. When the death is practically instantaneous or immediate, there can be no recovery. *Hansford's adm'x* v. *Payne & Co.*, 11 Bush (Oct. 4, 1875).

6. Where the question was, whether the train had been thrown from the track in consequence of the negligence of the company, or its agents or servants—evidence of negligence or carelessness which could not have contributed to that result, was clearly incompetent. *Louisville & Nashville R. R. Co.* v. *Fox*, 11 Bush (Nov. 2, 1875).

7. If a street-car driver sees a person on the track, who is apparently capable of taking care of himself, and the person is far enough in advance to have time to get off before the team can reach him, the driver has a right to presume that he will leave the track in time to avoid being run over; and he will not be chargeable with negligence, if he acts upon such pre-

sumption, and the person remains on the track and is injured. But the rule is otherwise, when the person is an infant three and a half years old, and apparently incapable of taking care of himself. *Louisville City Railway Co.* v. *Brotzge, &c.*, 11 Bush (Nov. 8, 1875).

8. Upon whom lies the burden of proof in cases of negligence. *Louisville City Railway Co.* v. *Brotzge, &c.*, 11 Bush (Nov. 8, 1875).

9. All kinds of railroads, whether the cars are impelled by horse or steam power, whether the rails are of iron or not, are liable for injuries to persons from negligence, under the act of March 10, 1854. *Johnson's adm'r* v. *Louisville City Railway Co.*, 10 Bush, 231.

10. An allegation that a railroad company "carelessly, negligently, wrongfully, and unlawfully" ran its cars over and killed plaintiff's intestate, does not amount to an allegation of willful negligence; and recovery must be confined to compensatory damages. *Jacob's adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

11. Punitive damages can not be awarded against a railroad company, unless the negligence of its servants is so great as to be *quasi*-criminal. (Board of Internal Improvements of Shelby County v. Scearce, 2 Duvall, 576; Louisville & Portland Canal Co. v. Murphy, adm'r, &c., 9 Bush, 522; Louisville, Cincinnati & Lexington R. R. Co. v. Case's adm'r, 9 Bush, 728.) *Jacob's adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

12. If the person killed fails to use reasonable care, and by such failure co-operates in causing the death, no recovery can be had—unless the servants, by exercising ordinary care, might have prevented the injury. *Jacob's adm'r* v. *Louisville & Nashville R. R. Co.*, 10 Bush, 263.

13. To authorize a recovery under section 3 of the act of March 10, 1854, it is essential that the loss of life shall have been the result of willful neglect; and the petition must charge the exact character of the neglect. *City of Lexington* v. *Lewis' adm'x*, 10 Bush, 677.

14. An allegation in a petition that a work was done "so recklessly, carelessly and wantonly, and with such indifference to the rights of others," that a person was killed, is not a full

equivalent to a charge that the life was lost by the willful neglect of the person doing the work. *City of Lexington* v. *Lewis' adm'x*, 10 Bush, 677.

15. Willful neglect is such as is intentional, or implies actual malice—as in the case of knowledge of the perilous character of the work and failure to provide ordinary means of security. (2 Duvall, 577.) *City of Lexington* v. *Lewis' adm'x*, 10 Bush, 677.

16. The words "reckless," "indifferent," "careless," and "wanton" are never understood to signify positive will or intention—unless joined with other words which show that they are to receive an unusual interpretation. *City of Lexington* v. *Lewis' adm'x*, 10 Bush, 677.

17. Under section 3 of the act of March 10, 1854, no recovery can be had in the absence of proof that deceased lost his life, by reason of the willful neglect of the company or its agents. *Sullivan's adm'r* v. *Louisville Bridge Co.*, 9 Bush, 81.

18. A contractor is liable to his employees for any injury sustained by them, resulting from his negligence or that of his agents. *Sullivan's adm'r* v. *Louisville Bridge Co.*, 9 Bush, 81.

19. Contributory negligence will not prevent plaintiff from recovering—if the defendant, by the exercise of ordinary care, could have avoided the consequences of plaintiff's negligence. *Sullivan's adm'r* v. *Louisville Bridge Co.*, 9 Bush, 81.

20. Contributory negligence in this case was the want of ordinary care on the part of deceased in protecting himself from danger. *Ibid.*

21. If the defects were such as the company or its agents ought to have known, or by the exercise of ordinary vigilance could have known, the company is responsible. *Ibid.*

22. The relation between employer and employee requires that the employer use ordinary care in the selection of materials to be used by his laborers, and in the selection of overseers to manage his hands. *Ibid.*

23. If the laborer suffer injury by reason of his employer's negligence, he may recover damages. *Ibid.*

24. When the employee undertakes to perform labor that is necessarily dangerous, he so far assumes the risk as to require

the exercise of ordinary prudence and caution on his part. *Ibid.*

25. The employee is not bound to engage in work that places his life in peril; and when labor of that sort is voluntarily assumed and an injury occurs, he cannot look to his employer for damages upon the ground of negligence, if by the exercise of ordinary vigilance he could have avoided the accident. *Ibid.*

26. If the employee knows of the unsafe condition of material furnished, and voluntarily uses it, thereby sustaining an injury, he is without remedy. *Ibid.*

27. There are cases where the employee has the right to depend upon the judgment of his employer as to the safety of the material furnished him, and in such instances, when he is injured by the negligence of the party furnishing the material, his right to recover is unquestioned. *Ibid.*

28. Death of a child from injuries caused by being negligently run over: *Held*—that the parent can only recover by way of damages his expenses for medical attendance, nursing, etc., and for loss of service from the date of the injury to the time of the child's death. *Covington Street Railway Co.* v. *Packer*, 9 Bush, 455.

29. *Actio personalis moritur cum persona.* The child in this case, if living, or his personal representative, if dead, could maintain an action and recover exemplary damages upon facts showing an injury from negligence, as provided in the act of March 10, 1864. *Ibid.*

30. Damages for mental suffering of one person, on account of a physical injury to another, are too remote to be given by court or jury. *Ibid.*

31. Owner of private bridge is not liable for loss of life or injuries sustained by a person in crossing it, without a special right to pass and an agreement on the part of the owner to repair. *Louisville & Portland Canal Co.* v. *Murphy, adm'r, &c.*, 9 Bush, 522.

32. Negligence is a question of law as well as of fact. *Ibid.*

33. Negligence of a child is the negligence of the parent. *Ibid.*

34. Willful neglect is equivalent to intentional wrong. *Ibid.*

35. Where death is caused by ordinary negligence, there is no cause of action except against a railroad company, as per section 1 of the act of March 10, 1854. *Ibid.*

36. The employees of a railroad company directing the movements of one train must, with reference to those controlling another, be regarded as the agents of the company; and the company is responsible for injuries to a person of the one class, resulting from the negligence of one of the other. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Caven's adm'r*, 9 Bush, 559.

37. A railroad company is liable for injuries to one employee resulting from the negligence of another. *Ibid.*

38. One entering the service of another assumes all ordinary risk; but this means only that he can not recover for any injury that his employer, by the exercise of ordinary prudence, could not provide against. *Ibid.*

39. Where the employees are not subordinate the one to another, and one is injured through the negligence of another, they are regarded as agents of each other, and no recovery can be had against the employer. *Ibid.*

40. But a subordinate can recover against the employer for the negligence of other employees, who were his superiors, or over whose actions he had no control or the right to advise. *Ibid.*

41. Negligence of the driver of a street-car is no defense in an action against other persons, whose negligence, concurrent with the driver, caused the death of a passenger. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Case's adm'r*, 9 Bush, 728.

42. Measure of damages for death caused by negligence is, the value of decedent's power to earn money. *Ibid.*

43. The allegation of willful negligence in an action against a railroad company includes all the inferior grades, and the jury must assess the damages according to the provisions of the act itself. *Ibid.*

44. If a person moor a boat in the channel of the river so as to obstruct or interfere with the navigation of another boat, this does not justify the latter in destroying the former; and if, in passing, the latter injures the other, when by proper precaution and skill it could have been avoided, the owner of the

latter is liable in damages. *Digby, &c.* v. *Kenton Iron Co.*, 8 Bush, 166.

NEGOTIABLE NOTES.

See BILLS OF EXCHANGE AND NOTES.

NEGROES AND MULATTOES.

The issue of marriages customary among negroes before Feb. 14, 1866, are the legal heirs of their parents. The act of that date did not intend to make them bastards. *Whitesides, &c.* v. *Allen, guardian, &c.*, 11 Bush (March 10, 1875).

NEW CAUSE OF ACTION.

1. Where a husband and wife are sued for a debt of the wife created before the marriage, an amended petition filed averring that they had since been divorced, and seeking judgment against the wife, sets up no new cause of action. *Joyes* v. *Hamilton*, 10 Bush, 544.

2. Process on an amended pleading should be served, where it presents a new cause of action distinct from the original, and of which the defendant could not be apprised by an inspection of the original petition. (Rutledge v. Vanmeter, 8 Bush, 354; McGrath v. Balser, 6 B. Mon., 141.) *Joyes* v. *Hamilton*, 10 Bush, 544.

NEW COUNTY.

Robertson county court was bound to make the levy on that part of the inhabitants and property which were taken from Bracken, but which still remained incorporated with Robertson after the passage of the supplemental act. Mandamus was the proper proceeding to compel the county court to make the levy. *Bracken Co. Court* v. *Robertson Co. Court*, 6 Bush, 69.

NEW PROMISE.

1. See LIMITATIONS.

2. A new promise to pay a debt barred by the statute of limitation must be express, or an unqualified acknowledgment that the debt is a subsisting debt which the party is willing to pay; and this promise or acknowledgment must be to the party or his agent. *Trousdale's adm'r* v. *Anderson*, 9 Bush, 276.

3. A new promise or unqualified acknowledgment to a stranger, will not take the case out of the statute or constitute a good cause of action. *Ibid.*

4. A debt barred by the statute of limitations may be revived by a new promise. *Hopkins* v. *Stout*, 6 Bush, 375; *Gray* v. *McDowell*, 6 Bush, 475.

NEW TRIAL.

1. A new trial was sought, some four years after the first trial, upon the alleged ground of newly discovered evidence; but refused, because with reasonable diligence the evidence offered as new could have been discovered and produced on the former trial. *Alexander* v. *Waller, &c.*, 11 Bush (April 9, 1875).

2. The new matter necessary to authorize a new trial must generally be, to prove what was before in issue, and not to prove a title not before in issue—not to make a new case, but to establish the old one. It must have first come to the knowledge of the party after the time when it could have been used in the cause at the original hearing. It must be such as the party could not, by the use of reasonable diligence, have known. *Alexander* v. *Waller, &c.*, 11 Bush (April 9, 1875).

3. Appeal, without motion for new trial, having been made, brings before the court of appeals only the pleadings, verdict, and judgment; and if the pleadings and verdict authorize the judgment rendered, it will be affirmed. *Harper* v. *Harper*, 10 Bush, 447.

4. On a motion for a new trial, the court should review all its rulings excepted to by the unsuccessful party, and, if error has been committed to his prejudice, grant a new trial; and a refusal

to do so, in such case, will be error, for which the order will be reversed and the case remanded for a new trial. *Harper* v. *Harper*, 10 Bush, 447.

5. A. being temporarily in Kentucky, was sued by several persons, but destroyed the copies of summons delivered to him. Afterwards, with his counsel, he asked to see the papers of all the suits against him, stating that he thought B. was plaintiff in one of them. The clerk found the other suits, but failed to find the suit of B. against A. B.'s attorney was present, and assisted in finding the papers. Judgment by default went against A. in favor of B. Upon his petition for a new trial, *held* that a new trial should be granted. *McCall* v. *Hitchcock*, 9 Bush, 66.

6. An appeal will lie from an order granting a new trial, upon petition, under sec. 579, Civil Code. *McCall* v. *Hitchcock*, 9 Bush, 66.

7. After getting a new trial, defendant cannot prosecute an appeal from the original judgment. *McCall* v. *Hitchcock*, 9 Bush, 66.

8. A new trial should be granted without requiring the payment of costs, when a party is prejudiced by erroneous instructions. *Ullman, &c.* v. *Abrams*, 9 Bush, 738.

9. Motion for a new trial suspends the judgment until the motion is disposed of. (13 B. Mon., 234.) *Louisville Chemical Works* v. *Commonwealth*, 8 Bush, 179.

10. Further time to complete bill of exceptions must be given to a certain day in the next term. *Smith, &c.* v. *Blakeman*, 8 Bush, 476. And the plaintiff did not waive his right to filing it, by reason of assistance given by his attorney in its preparation. *Same*, 476.

11. Bill of exceptions sufficient, if there is enough to show that it contains all the evidence, and that appellant filed grounds for new trial. *Wing, &c.* v *Dugan*, 8 Bush, 583.

12. One of the party's counsel failed to attend on account of sickness, and the party did not attend court nor procure other counsel: Is no ground for new trial. *Landrum* v. *Farmer*, 7 Bush, 46.

13. It is a general rule that a new trial shall not be granted upon the sole ground of a discovery, after verdict, of parol tes-

timony concerning a point litigated, or a fact known to a party. *Leonhart* v. *Stalzenberger and wife*, 7 Bush, 209.

14. The error must be specified, in the motion for a new trial. (5 Bush, 206.) *Lou., Cin. & Lex. R. R. Co.* v. *Mahoney's adm'x*, 7 Bush, 235.

15. Party to whom new trial is granted on payment of costs, shall pay them previous to the new trial. *Carbon & Bettis* v. *Stout*, 7 Bush, 609. Must pay within forty days after new trial granted. Sec. 27, chap. 26, Gen. Stat., 268.

16. To entitle a party to a new trial, the newly discovered evidence must be of such permanent and unerring character as to preponderate greatly, or have a decisive influence upon the evidence to be overturned by it. *Allen* v. *Perry*, 6 Bush, 85.

17. When the condition of a married woman does not appear in the record, she has the right to have the judgment against her opened. *Adams* v. *Jett's adm'r*, 6 Bush, 585. (Civil Code, subsec. 5, sec. 579.) *Mitchell* v. *Moore's assignee*, 6 Bush, 659.

18. Neither party should be permitted to re-litigate the same matter, except on some of the grounds for a new trial. *Owens* v. *Rawleigh*, 6 Bush, 656.

19. Where a rehearing is improperly granted by the circuit court, and judgment reversed, the original judgment is restored and affirmed. *Phillips* v. *Skinner*, 6 Bush, 662.

20. When the condition of an infant defendant does not appear in the record, he is entitled to a new trial. (Civil Code, subsec. 5, sec. 579.) *Jamison, &c.* v. *Petit*, 6 Bush, 669.

21. Non-resident defendant constructively served may appear and defend within five years after judgment. (Civil Code, sec. 445.) *Kinney, &c.* v. *O'Bannon's ex'x*, 6 Bush, 692.

22. Defendant resided in a remote county, having a good defense, and no knowledge of the non-attendance of his attorney, who was unavoidably absent: New trial granted. *Triplett* v. *Scott*, 5 Bush, 81.

23. Evidence offered being entirely parol and cumulative to that presented in the original case, insufficient to authorize a re-hearing. *Mason, &c.* v. *Mason, &c.*, 5 Bush, 187. And a defense which defendants must have had knowledge of, is not available for a new trial. *Same*, 187.

24. Errors not specified in the grounds for a new trial must be treated as waived, in the court of appeals. (Civil Code, sec. 372; 3 Bush, 480.) *Slater* v. *Sherman*, 5 Bush, 206.

25. Arresting judgment and dismissing indictment reversed, a new trial must be awarded by the circuit court. *Commonwealth* v. *Tanner*, 5 Bush, 316.

26. Motion for a new trial must be made in the court below, before errors can be heard in the court of appeals. (2 Bush, 580.) *Detherage* v. *Montgomery*, 4 Bush, 46.

27. Where law and facts are submitted to the court below, no motion for a new trial necessary. *Union Ins. Co.* v. *Groom*, 4 Bush, 289.

28. Infants, and defendants constructively summoned, allowed by law alternate remedies to re-try the cause; but not allowed to proceed by both remedies at same time. *Speak, &c.* v. *Mattingly, &c.*, 4 Bush, 310.

29. On defendant's motion for a new trial, in an action of malicious prosecution for felony, circuit judge announced that he would grant a new trial unless the plaintiff would accept a judgment for $1,000 in discharge of the verdict for $4,000. He did so under protest, and appealed. Judgment reversed. *Brown* v. *Morris*, 3 Bush, 81.

30. It is the duty of plaintiff and his attorney to know of ordinances before bringing suit; and if they do not, it is no ground for a new trial. *Babbitt* v. *Woolley, &c.*, 3 Bush, 703.

31. In a trial for felony, where proof of the separation of the jury or of exposure to improper influences is had, it is for the Commonwealth to show that no undue influences were used; and if it fails, the verdict must be set aside. *Commonwealth* v. *Shields*, 2 Bush, 81. Failing to swear the officers having charge of the jury, as required by sec. 342, Criminal Code, will be ground for a new trial. *Same*, 81.

32. Motion for new trial must be made at the term the verdict is rendered. If the petition fails to state a cause of action, and judgment be rendered by default, court will reverse the judgment. *Humphreys* v. *Walton, &c.*, 2 Bush, 580.

33. Imputed omission of defendant's counsel, and fraud of his co-defendant, no ground for new trial. *Dillingham* v. *Mudd, &c.*, 1 Bush, 102.

34. Time given to first day of next term to file bill of exceptions: Must be then filed, or time extended to another day. If that day pass without further notice, the party's right to file will be lost. *Meadows* v. *Campbell*, 1 Bush, 104.

35. The day on which the verdict is rendered, is one of the three within which the motion for a new trial must be made. *White* v. *Crutcher*, 1 Bush, 472.

36. See GARNISHEE. *Coburn, &c.* v. *Currens & Owens*, 1 Bush, 242.

NON EST FACTUM.

1. The plea of *non est factum* must be made in affirmative language and sworn to. *Trustees Ky. Female Orphan School* v. *Fleming, ex'r, &c.*, 10 Bush, 224.

2. If one assumed to sign defendant's name without his authority, his subsequent acknowledgment and ratification of it will act retroactively so as to sanction the act as if authorized. *Forsythe* v. *Bonta*, 5 Bush, 547.

3. If in a suit by an assignee on a note, the defendant pleads *non est factum*, he ought to test the genuineness of the note by the verdict of the jury, before he can render the assignor liable on his implied warranty. *Wynn* v. *Poynter*, 3 Bush, 54.

4. Sureties on sheriff's bond, say, that when they signed the bond, the name of D. V. B. was to it as surety. They signed and acknowledged it in the presence of the county court, which, together with W. J. B., the principal, represented that D. V. B. had signed the bond, whereas he had not signed it; that it was not his act and deed, and that he was not bound by reason thereof: Wherefore they say it is not their act and deed, and they are not bound thereon. *Held* to be good. *Chamberlin & Tapp* v. *Brewer, &c.*, 3 Bush, 561.

5. The exoneration of the principal to a note, on the plea of *non est factum*, would not *per se* exonerate his surety, against whom judgment was authorized by the sheriff's return. *Dillingham* v. *Mudd, &c.*, 1 Bush, 102.

NON-RESIDENT DEFENDANTS.

1. See INFANTS.

2. Since the General Statutes, a non-resident or corporation *must* give a bond for costs *before* the commencement of an action; else, the action *shall* be dismissed. (Gen. Stat., 265.) *Portsmouth F. and M. Works* v. *Iron Hills F. and M. Co.*, 11 Bush (March 18, 1875).

3. The jurisdiction is acquired thirty days after the order of warning, at which time the defendant is deemed to be constructively summoned. Jurisdiction of the court over the thing sought to be sold, and the jurisdiction acquired over the person of the defendant by the constructive service of process provided by law, authorizes the court to proceed; and although failure to appoint the attorney, or to take the bond as required by sec. 440, Civil Code, are reversible errors, the jurisdiction being complete, the judgment will not be void. *Thomas* v. *Mahone*, 9 Bush, 111.

4. Judgments are not void because the attorney appointed to defend could not lawfully communicate with the absent defendant. *Thomas* v. *Mahone*, 9 Bush, 111.

5. Attorneys appointed to defend for absent defendants, and bonds to restore the property, etc., as provided in sec. 440, Civil Code, are for the protection of the interests of the absent defendants, and not to give the court jurisdiction. *Ibid.*

6. The attorney to defend is required to correspond with the defendant if he can be found; but his failure to do so, merely deprives him of the right to compensation, and does not affect the validity of the steps taken by the court. *Ibid.*

7. Depositions taken upon notice to corresponding attorney, appointed for non-resident infant defendants, before a guardian *ad litem* was appointed to defend for them, may be read as evidence against such infants on the hearing, after the appointment and defense of a guardian *ad litem* has been made for them. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

8. Equity will set off the debt of one partner on a non-resident firm against a debt due the firm by a resident of Kentucky, and require a settlement of the partnership as incident thereto,

as sought in the answer. *Wallenstein* v. *Seligman & Co.*, 7 Bush, 175.

9. Sec. 88, Civil Code, provides that the defendant shall be warned to appear in the action on the first day of the next term of the court which does not commence within sixty days of the time of making the order. Nothing short of a substantial compliance with every prerequisite will give the court jurisdiction of the property sought to be subjected; and if not complied with, the judgment and sale thereunder are void. *Brownfield, &c.* v. *Dyer, &c.*, 7 Bush, 505.

10. A resident wife may sue her non-resident husband for a divorce. *Rhyms* v. *Rhyms*, 7 Bush, 316.

11. A personal judgment cannot be rendered against a non-resident on service of process by copies. *Berry* v. *Berry's ex'r*, 6 Bush, 594.

12. One non-resident may sue out an attachment against another non-resident of this State. *Gray, &c.* v. *Briscoe*, 6 Bush, 686.

13. Non-resident defendants may appear and defend within five years after judgment. *Kinney, &c.* v. *O'Bannon's ex'x*, 6 Bush, 692.

14. A recognizance of record for costs is sufficient, and may be enforced in a summary way. *Same*, 692.

15. After a voluntary assignment by a citizen of Ohio to another citizen of that state, assigning his debts, and all of his estate everywhere for payment of all of his debts, without discrimination or preference, according to the laws of Ohio, Kentucky creditors sued out and attached a debt due by a citizen of Kentucky to the insolvent non-resident. The attaching creditors never acceded to the assignment. In the Kentucky courts, the attachment liens have preference over the title and claim of assignee. *Johnson* v. *Parker, &c.*, 3 Bush, 149. There was no proof that the foreign creditors had acceded to the assignment, nor that the fund in litigation was necessary for paying other creditors; nor has the assignee executed a bond prescribed by law for the benefit of creditors. (Act of 1860, Myers' Sup., 533.)

NOTARY PUBLIC.

1. A notary is held not liable, in this case—in a matter in which judicial construction was necessary to enable him to know what was his duty. *Neal & Co.* v. *Taylor*, 9 Bush, 380.

2. When the residence of the parties is known to the notary, it is his duty, under the act of January 16, 1864, to give or send the notices to such parties as are sought to be made liable. *Ibid.*

3. When the residence of such parties is in the same town or city in which the protest is made, and known to the notary, a notice should be delivered in person by the notary, or left at the dwelling or business-house of the party sought to be charged, on the day of dishonor of the paper, or before the expiration of the business hours of the succeeding day. *Ibid.*

4. A notary public is liable, for a loss occasioned by his negligence—in failing to discharge his duty in protesting, and delivering or mailing notices of protest, as required by law. *Ibid.*

5. In order to fix such liability, the loss must be shown to have been on account of the want of skill or diligence on the part of the notary. *Ibid.*

NOTES.

See BILLS OF EXCHANGE AND NOTES.

NOTICE.

1. What is sufficient or essential notice, to an attorney required to show cause why he should not be punished for contempt. *In re* Robert W. Woolley, 11 Bush (April 9, 1875).

2. Persons contracting with the city council of Louisville are bound to take notice of limitations, not only upon its power, but also as to its mode of contracting. *Craycroft, &c.* v. *Selvage, &c.*, 11 Bush (April 16, 1875).

3. Notice is necessary to a principal, of an application to court—fourteen years after a surety has paid a judgment against the former—for an order to vest in the surety the right to control

the judgment to which he is entitled by statute. *Veach, &c.* v. *Wickersham, &c.*, 11 Bush (June 29, 1875).

4. It is a general rule, that notice of an outstanding equity applies to every one whose title comes to him affected with such notice. *Bank of America* v. *McNeil*, 10 Bush, 54.

5. The knowledge of the cashier, that a stockholder had pledged his stock to secure a debt, was sufficient notice to the bank. *Bank of America* v. *McNeil*, 10 Bush, 54.

6. A promissory note, made payable to one as "trustee" and indorsed in blank by him as "trustee," bore upon its face evidence of a trust sufficient to put one on inquiry. *Prather, &c.* v. *Weissiger, &c.* 10 Bush, 117.

7. A purchaser at an execution sale, who has no notice of a title-bond or a deed that has not been recorded within the prescribed time, will be protected in his title even in a court of equity. *Low & Whitney* v. *Blinco, &c.*, 10 Bush, 331.

8. A purchaser with notice will also be protected, in case the execution creditor acts in good faith and without notice. *Low & Whitney* v. *Blinco, &c.*, 10 Bush, 331.

9. Notice to the purchaser, after his purchase, does not affect him; he has the absolute right to perfect it by procuring a conveyance from the sheriff. *Low & Whitney* v. *Blinco, &c.*, 10 Bush, 331.

10. Notice to the execution creditor, at any time before he purchases, affects his conscience; and he may be compelled—in obedience to the equity evidenced by the bond or unrecorded deed—to transfer the legal title to the party against whom he ought not, in good conscience, to hold it. (Halley v. Oldham, 5 B. Mon., 235.) *Low & Whitney* v. *Blinco, &c.*, 10 Bush, 331.

11. The acts of 1785 and 1796, so far as they relate to the rights of purchasers and creditors without notice of an unrecorded deed, were substantially re-enacted in the Revised Statutes and in the General Statutes. *Low & Whitney* v. *Blinco, &c.*, 10 Bush, 331.

12. When there is a conditional sale of chattels, with an actual delivery of possession to the vendee, a purchaser from the latter, in good faith and without notice of the condition, acquires a perfect title. *Vaughan, &c.* v. *Hopson*, 10 Bush, 337.

13. Transfer of actions pending in the circuit court, to the court of common pleas created by an act of the legislature, notice to litigants. *Shean* v. *Cunningham*, 6 Bush, 123.

14. Notice to the husband is notice to the wife. *Bennett and wife* v. *Titherington, &c.*, 6 Bush, 193.

15. Possession of land under a parol contract of purchase, *held* to be legal notice to creditors of the vendor. *Crawford* v. *Woods, &c.*, 6 Bush, 200.

NOVATION.

The execution of the new note by only part of the obligors in the old note was a complete novation—which substituted a new debt for the old one, and gave a right of action for any usury that had been paid; and, consequently, the statute of limitations began to run at that time. *Smith* v. *Young, &c.*, 11 Bush (Oct. 13, 1875).

NUISANCE.

1. See DAMAGES.

2. Private individuals seeking relief against a public nuisance must show that they suffer an injury distinct from that of the general public, and which the public has not the right to inflict on them without compensation. *Cosby, &c.* v. *Owensboro and Russellville R. R. Co.*, 10 Bush, 288.

3. An indictment for erecting and continuing a nuisance, by obstructing a street, cannot be maintained when there was no acceptance by the town, expressly or by implication, of the dedication of the street by the owner. *Gedge, &c.* v. *Commonwealth*, 9 Bush, 61.

4. A purchaser of property on which a nuisance is erected is not liable for its continuance, unless he has been requested to remove it, or informed that its removal is required. *West & Bro.* v. *Lou., Cin. & Lex. R. R. Co.*, 8 Bush, 404.

5. The chancellor will not interfere by injunction, where the nuisance sought to be abated or restrained is eventual or contingent, nor where the evidence is conflicting and the injury to

the public or to the individual complaining doubtful. But where the injury is of such a nature as is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented—when the injury is irreparable or where loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act or eviction, then an injunction will be granted. (2 Story's Equity, sec. 924; Earl of Ripon v. Hobart, 1 Cooper's Selected Cases; 18 B. Mon., 800.) *Hahn and Harris* v. *Thornberry, &c.*, 7 Bush, 403.

6. Owner of land has no right to stop the natural flow of water, and flood the lands of the proprietor above him; and dams erected to form ice-ponds in this case abated, and defendant perpetually enjoined in the case. *Same*, 403. (Washburn on Real Property, 66).

7. Pens in the city of Covington wherein are kept large numbers of horses, cattle, hogs, &c., *held* to be a nuisance, although kept for thirty years, and when first established were outside of the city. Pursuit of a noxious trade is lawful, so long as it does not interfere with the rights of the public; but when it does so interfere it becomes illegal, and no length of time will sanctify it. Offensive odors and smells of a loathsome trade, if detrimental to the comfort of those dwelling around and to passers-by, is a nuisance, and should be abated, although not actually producing disease. If the defendant is found guilty, upon an indictment for the offense, the court should order the nuisance to be abated against a given day; and in case of his failure, should order the sheriff to do it. *Ashbrook* v. *Commonwealth*, 1 Bush, 139.

OCCUPYING CLAIMANTS.

1. A widow and her four daughters, acting as if of age, sold ground left by the husband and father, and in the deed bound themselves that two minor children of two deceased brothers should confirm the sale and conveyance. The property passed through several hands, of whom one made valuable improvements. One of the four daughters died in infancy. Another,

seeking to avoid her part in the sale and conveyance on the ground of infancy, joined with the two grandchildren in a suit for a division of the property or for a sale and division of the proceeds. It was sold. *Held*—that the statute in reference to occupying claimants (sec. 1, art. 1, chap. 70, Rev. Stat.) did not apply; but *held*, also—that each grandchild and the daughter who was an infant are each entitled to one-fifth of the value of the ground at the time of the recent sale by order of court—exclusive of bricks and of the improvements thereon—and to one-fifth of the rents before said sale, and interest afterward. *Burton* v. *Little, &c.*, 9 Bush, 307.

2. The value of ameliorations, and not the actual cost of the improvements, is the measure of recovery, under an oral contract terminated by the death of the owner of the land. *Booth's ex'r* v. *Vanarsdale*, 9 Bush, 717.

OFFICE AND OFFICERS, AND OFFICIAL BONDS.

1. See COUNTY JUDGE (9 Bush, 599); and BONDS, STATUTORY.

2. Where the compensation of a municipal officer is in fees or commissions, he is not entitled to the compensation unless he performs the services; nor can he recover damages on account of having been prevented from performing the services whereby he would have earned the designated compensation. Employment in a public office creates no such rights or liabilities as accrue to individuals, in case of breach of contract caused by act of one of the contracting parties. *Wheatly* v. *City of Covington*, 11 Bush (March 9, 1875).

3. The rule, founded upon public policy, which requires the acts of *de facto* officers to be treated for many purposes as valid and binding, does not apply when an oath administered by such an officer is made the foundation of a prosecution for perjury. *Biggerstaff* v. *Commonwealth*, 11 Bush (April 19, 1875).

4. A collecting officer has no right to require an indemnifying bond, unless he doubts whether the property levied upon, or which he is required to levy upon, is subject to the execution. *Secrets, &c.* v. *Markwell*, 11 Bush (Sept. 22, 1875).

5. The State, to make available the harsh and extraordinary remedy by motion against sheriffs (sec. 7, art. 1, chap. 92, Gen.

Stat.), must follow strictly the statute. (Calloway v. Commonwealth, 4 Bush, 383; Hall, &c. v. Commonwealth, 8 Bush, 378.) *Basham, &c.* v. *Commonwealth*, 11 Bush (Nov. 18, 1875).

6. Trustee of a jury-fund is an officer authorized to collect and receive public moneys, within the meaning of sec. 1, art. 12, chap. 83, of the Revised Statutes; and may be proceeded against, by motion in the fiscal court, for a failure to pay funds in his hands into the treasury. *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

7. A judgment on a motion against an officer without notice can not, if the court had jurisdiction, be treated in a collateral proceeding as void. *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

8. The Commonwealth can not be deprived of its right to prosecute its claim, against any part or all of the estate bound by its judgment lien, until its debt is fully satisfied. *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

9. The forfeiture of the right to hold office for duelling, is a punishment which can only be inflicted in a direct proceeding by indictment and trial by jury. *Commonwealth* v. *Jones*, 10 Bush, 725.

10. The legislature has no constitutional power to require a reduction to be made from the salary of the chancellor of the Louisville chancery court, except for neglect of official duty. The proviso of the act of Feb. 11, 1871, "that the allowance to judges and chancellors *pro tem.* shall be paid out of the increased salary of the judge or chancellor," which requires a deduction except for neglect of official duty, is to such extent unconstitutional and void. *Auditor* v. *Cochran*, 9 Bush, 7.

11. The increase of the duties of a city officer does not imply any obligation to increase his salary. *City of Covington* v. *Mayberry*, 9 Bush, 304.

12. Temporary absence of a county officer from the county will not vacate his office. *Curry* v. *Stewart*, 8 Bush, 560.

13. The mere failure of the sheriff to execute bond as required by law, does not *ipso facto* forfeit his office. *Brown, &c.* v. *Grover, adm'r*, 6 Bush, 1.

14. The office of postmaster is incompatible with that of county judge; and his acts as to himself are null, and may be ques-

tioned by any kind and in all proceedings. *Hoglan* v. *Carpenter*, 4 Bush, 89.

15. The duelling oath can not be dispensed with by act of the legislature. Persons deprived of the right of holding an office by participating in a duel can only be restored by pardon. If a person is eligible, and has taken such oath as required by law, but not the duelling oath, his acts are not void; but his installation may be regarded as regular, until his office is vacated by judgment of a court. But if the person was ineligible, however regular his installation, is no protection to him in a suit to hold him responsible. *Morgan, &c.* v. *Vance*, 4 Bush, 323.

16. County courts have power to remove sheriffs from office for failing to give new bonds at time required by law. *Bartly* v. *Fraine, &c.*, 4 Bush, 375.

17. W. B. E. did not sign the general bond of the sheriff; and as there is no order of court approving the bond without his name, the other sureties are not bound. *Fletcher, &c.* v. *Leight, Barrett & Co.*, 4 Bush, 303.

18. The Franklin circuit court should not have rendered judgment against the sheriff and sureties of Harlan county, on a bond executed at the June term of the Harlan county court. The law required the bond to be executed at the January or February term. *Calloway, &c.* v. *Commonwealth*, 4 Bush, 383.

PARDON.

The pardon provided for by the act of Jan. 13, 1866 (Myers' Sup., 744), operated as a general pardon. *McAlister's ex'r* v. *Commonwealth*, 6 Bush, 581.

PARENT AND CHILD.

1. See ADVANCEMENTS; CONSIDERATION; and TRUST.

2. It is the natural and legal duty of a father to support his children, and it is only under peculiar circumstances that he will be allowed to charge them for maintenance or education. *Tanner, &c.* v. *Skinner, &c.*, 11 Bush (April 13, 1875).

3. Both courts of law and equity will exercise a sound discretion, and will not, as a matter of course, interfere and take a

child—though under fourteen years of age—from the possession of a third person, and deliver it to the father against the will of the child. And it is the duty of the court to see that the infant is not restrained against her will. *Ellis* v. *Jesup and wife*, 11 Bush (Oct 14, 1875).

4. In this case, the girl was over thirteen years of age, intelligent, and of competent judgment to make a proper choice. That choice should control the action of the court in the matter. Nor did the court err in going in person to examine the infant touching her wishes; and the consent of appellant or his counsel was immaterial. *Ellis* v. *Jesup and wife*, 11 Bush (Oct. 14, 1875).

5. As a general rule, the father is entitled to the custody of his infant children; but sometimes the welfare of the child requires that the mother have the custody. *McBride* v. *McBride*, 1 Bush, 15.

PAROL CONTRACTS.

See CONTRACTS; and STATUTE OF FRAUDS AND PERJURIES.

PARTIES TO CIVIL ACTIONS.

1. See BANKS; PLEADINGS AND PRACTICE IN CIVIL ACTIONS; and PRACTICE IN THE COURT OF APPEALS.

2. Who are proper parties to an action by a ward to recover balance due by her guardian, where the latter died insolvent after a distribution of all his estate among creditors, at whose instance a conveyance thereof had been declared fraudulent. *Roberts and wife* v. *Phillips, &c.*, 11 Bush (March 5 1875).

3. In equity proceedings to sell a trust estate, it is not necessary that all the creditors should be made parties. To invalidate a sale on this ground, would retard the settlement of such estates and frequently exhaust them by protracted litigation and unnecessary costs. *M. P. Robinson, &c.* v. *B. F. Robinson's trustee, &c.*, 11 Bush (April 20, 1875).

4. In a suit for damages resulting from an agreement between several parties, one cannot be made liable for disregarding its

terms who was not a party contracting, and when the petition discloses that he has no interest in it. The court properly dismissed the petition as to him. *Dillon* v. *Crook & Co., &c.*, 11 Bush (Sept. 24, 1875).

5. Where an injury is committed to the wife during coverture, by battery or slander, the wife cannot sue alone or by next friend, but the husband must join—if the action be for the personal suffering or injury to the wife. (1 Chitty's Pleading, 74.) *Anderson &c.* v. *Anderson*, 11 Bush (Sept. 24, 1875).

6. Defect of parties plaintiff is a fact which can not be raised, for the first time, in the court of appeals. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

7. Nominal attitude of a party, as defendant, does not change his real attitude towards antagonistic parties or change the real character of his real pleading. *Low & Whitney* v. *Blinco, &c.*, 10 Bush, 331.

8. Actions against officers of a corporation for misconduct as such, should be brought by the corporation itself; but if it be in the hands of such officers, the stockholders may sue in equity in its stead. (2 Atkyns, 400; 3 Paige, 230.) *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

9. If the non-joinder of a defendant appears on the face of the petition, objection must be made by demurrer. If the non-joinder appears by evidence, the defect must be relied on in the answer; otherwise it will be regarded as waived. (Albro v. Lawson, 18 B. Mon., 642; Civil Code, sec. 123.) *Waits* v. *McClure*, 10 Bush, 763.

10. A judgment or decree is conclusive as between the parties and privies to it; but never concludes persons who are not parties or privies. *Memphis & St. Louis Packet Co.* v. *Grey*, 9 Bush, 137.

11. None can be considered as parties to a suit who are not named as such in the record. *Ibid.*

12. Full names of persons set out in the caption makes them parties. *Neely, &c.* v. *Merritt, &c.*, 9 Bush, 346.

13. Beneficiaries in a trust-deed are necessary parties, in an action to recover the trust-estate. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

14. Where the title is held as a naked trust, with only a limited power to convey, the heirs of a deceased beneficiary are necessary parties to a suit to recover the trust-estate. *Ibid.*

15. An action for the recovery of the possession of specific personal property can not be maintained by joint owners, unless they all join as plaintiffs. *Bush, &c.* v. *Groom*, 9 Bush, 675.

16. By prosecuting the appeal from the judgment of the Franklin circuit court, rendered against them on the motion of the auditor, the sheriff and his sureties made themselves parties to the proceeding in the circuit court. *Culton* v. *Commonwealth*, 9 Bush, 701.

17. Joint obligors: Action may be brought against all or any of them. (Civil Code, sec. 39.) *Gossom* v. *Badgett*, 6 Bush, 97.

18. For the conversion of slaves devised, since the Revised Statutes, the personal representative and not the devisees can maintain the action. *Pendleton's ex'r, &c.* v. *Pendleton's adm'r*, 6 Bush, 469.

19. For further parties, see *Noland's ex'r* v. *Golden, &c.*, 3 Bush, 84, and *Justice* v. *Phillips*, 3 Bush, 200.

PARTNERS AND PARTNERSHIPS.

1. The general rule govering partnerships formed for commercial purposes is, that each partner may buy and sell goods belonging to, or for the use of, the partnership or the ordinary business thereof; and may pledge the partnership property, or borrow money for partnership purposes on the credit of the firm. But the same doctrine cannot be as universally affirmed as to the right to draw, or indorse, or accept, or negotiate bills of exchange, or to make or indorse promissory notes, not being the securities of third persons held by the firm as a part of the funds thereof and, therefore, disposable accordingly. *Judge, &c.* v. *Braswell, &c.*, 11 Bush (June 23, 1875).

2. In partnerships for mining or farming purposes, the directors or active agents thereof have not the power, as incident thereto, to draw or accept bills or to draw or indorse notes for the company. There should be some proof of express authority for this purpose, or that it is implied by the usages of the busi-

ness, or the ordinary exigencies and objects thereof. (Story on Partnership, sec. 126.) *Judge, &c.* v. *Braswell, &c.*, 11 Bush (June 23, 1875).

3. In an action to enforce the collection of bills of exchange—drawn in the firm name, upon individual members thereof—for the payment of mining lands, it is incumbent on the payee to show that the purchase of land was within the scope of the particular partnership trade and business in which the firm was engaged. (Story on Partnership, secs. 101, 111.) *Judge, &c.* v. *Braswell, &c.*, 11 Bush (June 23, 1875).

4. Where partnership funds are clandestinely withdrawn or misappropriated, by one or more partners without the consent and to the injury of the others, in such cases equity will compel a division of the profits derived from the funds thus misappropriated. *McAdams' ex'rs, &c.* v. *Hawes*, 9 Bush, 15.

5. A lease of the interest in partnership property of one partner to the other operates as a dissolution of the partnership absolutely, or, by the assent of the members, to suspend it during the continuance of the lease. *McAdams' ex'rs, &c.* v. *Hawes*, 9 Bush, 15.

6. Partnerships are dissolved by war. *McAdams' ex'rs, &c.* v. *Hawes*, 9 Bush, 15.

7. Belligerent relations between partners, during the late civil war, not only operated to dissolve or suspend partnerships then existing, but rendered it unlawful for such enemies actually or constructively to enter into new partnerships while such relations existed. *McAdams' ex'rs, &c.* v. *Hawes*, 9 Bush, 15.

8. If the individual note of one partner is accepted as a merger of a partnership liability, the other partner is thereby exonerated from any legal responsibility for the debt, whatever his liability may at first have been. But if the individual note of one partner was given and accepted, not merely as the note of that partner, but was meant and intended as an obligation for or on behalf of the firm, its acceptance did not exonerate the other partner from responsibility. *Smith* v. *Turner's adm'r*, 9 Bush, 417.

9. One defendant is competent to prove for his co-defendant that they are not partners. *Culbertson* v. *Holden, &c.*, 8 Bush, 161.

10. Real estate purchased for partnership purposes, and appropriated to those purposes, and paid for with partnership funds, becomes partnership property; but these facts must be shown, to exempt individual interests therein from attachment for individual liabilities. *Bank of Louisville* v. *Hall & Long*, 8 Bush, 672.

11. Equitable set-off of the debt of one partner of a non-resident firm, against a debt due the firm by a resident of Kentucky, allowed in this case. *Wallenstein* v. *Seligman, &c.*, 7 Bush, 175.

12. War dissolves partnerships. *New York Life Ins. Co.* v. *Clopton, &c.*, 7 Bush, 179.

13. Discharge in bankruptcy of one member of a firm does not release the others from the indebtedness of the firm. *Payne & Bro.* v. *Able, &c.*, 7 Bush, 344.

14. It is as much the duty of one partner as another to give his time and attention to winding up the affairs of the firm, unless the one has by contract or otherwise assumed the exclusive duty of doing so. A partner into whose possession the books, papers, and evidences of debts have come, is not liable for not using due diligence in collecting the debts of the partnership, where the other partner has remained passive. *Wilder* v. *Morris*, 7 Bush, 420.

15. Real estate purchased with firm assets and for partnership purposes becomes partnership property; and after necessary expenses are deducted, the widow of one of the partners is entitled to one-third part absolutely as distributee. *Bryant* v. *Hunter, &c.*, 6 Bush, 75; *Cornwall, &c.* v. *Cornwall, &c.*, 6 Bush, 369.

16. One partner, after dissolution of the firm and notice thereof, has no authority to bind his co-partner, by a note in the firm name—even though executed for a firm debt. *Montague* v. *Reakert*, 6 Bush, 393.

17. Land purchased and paid for with partnership funds, and title to one of the partners: he holds it in trust for the benefit of the partners. *Burnam* v. *Burnam*, 6 Bush, 389.

18. To bind a partner, by a note signed by his co-partner in his own name, it must appear that such name is the style of the firm. *Macklin's ex'r* v. *Crutcher*, 6 Bush, 401. And if the note

of one be accepted for the partnership liability, the other is exonerated. *Same*, 401.

19. Where partnership property is surrendered, to be levied on by attachment by one partner against his co-partner, the partner making the surrender is estopped from controverting the plaintiff's right to enforce the levy. If a private creditor of a partner attaches his interest in the firm, he can get nothing until the partnership debts are first paid. *Howell, Gano & Co.* v. *Commercial Bank of Kentucky*, 5 Bush, 93. (4 Bush, 25.)

20. R. & R. agreed to contribute all the money needed in purchasing tobacco during the war, and B. & B. agreed to secure permits and protect its shipment to market, for one-half of the profits. There was no agreement that they would pay any part of the loss. They were not liable for any part of the loss that accrued. *Rau & Rieke* v. *Boyle & Boyle*, 5 Bush, 253.

21. A suit and judgment against one partner, on an individual acceptance given by him in payment of an account against the firm, preclude a suit against the other members of the firm for the same debt. *Nichols & Co.* v. *Burton, &c.*, 5 Bush, 320. The Civil Code does not authorize separate suits, at different times, against partners. *Same*, 320.

22. H. & L. agreed to purchase of D. all the whisky made and to be made at his distillery, and allow him half of the profit over and above the price paid, deducting charges, etc. This did not make H. & L. partners of D., and as such liable for barrels furnished to D., who, without the knowledge of H. & L., was conducting the business in the name of D. & Co. *Donley* v. *Hall & Long*, 5 Bush, 549.

23. After dissolution, one partner has no right to incur new responsibilities, and execute new evidences of indebtedness in the firm name, without the knowledge or consent of the other. *Bacon, McClardy & Co.* v. *Hutchings, Duncan & Co.*, 5 Bush, 595.

24. Each partner is authorized to act for the others, and the firm is bound by his acts relative to their business, whatever may be the private arrangement between them. *Barker & Co.* v. *Mann, Bennett & Co.*, 5 Bush, 672.

25. A note, executed by one partner in his individual name, for the use and benefit of the firm, is binding against the other, who did not sign it; and a surety, who has paid it, has a cause

of action against the firm therefor. *Hicks* v. *Crawford & Long*, 4 Bush, 19. But, see *Macklin's ex'r* v. *Crutcher*, 6 Bush, 401.

26. The widow of a deceased partner, being sued as one of the members of the firm, made no defense, and judgment was rendered against her. Although in nowise liable for the debt, she could not enjoin its collection. *Hayden, &c.* v. *Moore*, 4 Bush, 107.

27. The act approved Feb. 12, 1858 (2 Stanton, 513), was intended to provide only for the sales of partnership property, and not the interests of joint tenants in land. *Brown, &c.* v. *Burdett, &c.*, 4 Bush, 401.

28. When partnership property has been levied on to satisfy a debt of one of the partners, a settlement of the partnership should be made, and only the interest of that partner subjected to sale—if any remains after settlement. *Williams* v. *Smith*, 4 Bush, 540. Case of Watson v. Gully, 18 B. Mon., 660, is overruled by the foregoing case.

29. The names of the drawer and indorsers on a bill of exchange were forged, but the acceptance was in the firm name. The bill was sold to the bank by the partner who accepted it, and proceeds drawn by him in the firm name, by an indorsement thereof on the forged check of the drawer and indorser. *Held* —that the other member of the firm was liable therefor. *Burgess* v. *Northern Bank of Kentucky*, 4 Bush, 600.

30. The surety of the firm of D. & W. was also surety of W. individually; and having received funds belonging to the firm, had no right to apply these partnership funds, even by the direction of W., to the payment of *his* debts without the consent of D. Having misapplied the funds of the firm without the sanction of D., and having paid the firm debt with his own money, the surety will be held to have paid the partnership debt with partnership funds. *Downing* v. *Linville*, 3 Bush, 472.

31. Partners received Confederate currency in 1862, which, by agreement, one of them should take South and invest for the benefit of the firm. He speculated in cotton, and made large profits, and was made accountable to his co-partners therefor. *Anderson's adm'r* v. *Whitlock, &c.*, 2 Bush, 398.

32. A partner having partnership funds in his hands, after the dissolution, and refusing to offer or to make payment to his

co-partner, becomes liable for interest. (5 Dana, 434.) *Taylor* v. *Young's adm'r*, 2 Bush, 428.

33. A party should not be permitted to disprove the fact which he had omitted, that he was a partner, and thereby induced the sale to them. *Walrath* v. *Viley*, 2 Bush, 478.

34. A conveyance by one partner, to a trustee, of his interest in the partnership property, to pay all of his individual and partnership debts, does not defeat the implied lien of the other partner and partnership creditors upon the partnership property. The implied lien has priority until all of the partnership debts are paid. *Bank of Kentucky* v. *Herndon, &c.*, 1 Bush, 359.

PASSWAYS.

1. See ROADS AND PASSWAYS.

2. A sale of a part of a tract of land in 1807, by the patentee, is held to have implied a grant of an indispensable outlet through the remainder of the tract. A right of way used from 1807, by agreement of parties was slightly changed, and gates mutually put up in 1815. This arrangement was constructively an express grant of the easement. *Thomas* v. *Bertram*, 4 Bush, 317.

PATENTS FOR LAND.

1. Where three patents all call for the same idea point, if there be no evidence of an actual location at some other point at the time of making the original surveys, the court must decide as matter of law that they do corner together; and if, assuming this to be true, there can not have been any vacant land between them, there is nothing to submit to the jury. *Munford* v. *Carpenter*, 11 Bush (March 19, 1875).

2. Every survey made and patent issued, under the act of 1835, on county court certificates for vacant and unappropriated land, which interferes with any survey or patent theretofore made or issued, is null and void. *McMillan's heirs* v. *Hutcheson, &c.*, 4 Bush, 611. When a patent is declared void by statute, the legal nullity of the patent may be shown collaterally, by extraneous proof of the fact that annulled it. (1 B. Mon., 368; 2

Marshall, 418; 3 Littell, 362; 4 Mon., 51; 4 Dana, 322; Same, 501; 7 B. Mon., 82; 16 B. Mon., 126.) Such patents are no documentary title, and being in possession under it, the seven years limitation does not apply. *Same*, 611.

3. Land surveyed in 1784; sold and conveyed in 1794; patent issued in 1850. Patent passed the legal title to the vendees by relation. *Same*, 611.

PATENT RIGHTS.

1. See JURISDICTION.

2. There is a manifest distinction between the right of property in the patent—which carries with it the power on the part of the patentee to assign it—and the right to sell the property or product resulting from the invention or patent. The fruits of the invention, or the article made by the application of the principle discovered, may be injurious to the public health or safety or morals; and then it becomes the duty, as it is the right, of the State to restrain its use. (Livingston v. Van Ingen, 9 Johnson, 581; U. S. v. Dewitt, 9 Wallace, 41.) *Patterson* v. *Commonwealth*, 11 Bush (Sept. 22, 1875).

PAUPERS.

The county court was bound to levy a tax, and provide means to pay allowances made, for the support of negro paupers for the years 1868, 1869, 1870. *Featherston* v. *Thompson, &c.*, 10 Bush, 140.

PAYMENT.

1. Surrender of note raises presumption of payment. *Wells' adm'r* v. *Robb*, 9 Bush, 26.

2. A partial payment on a note, made before a bar by limitation, is *prima facie* an acknowledgment that the residue is unpaid, and of a continuing liability therefor; and suspends the operation of the statute between the accrual of the cause of action on

the note and the date of that payment. *English* v. *Wathen*, 9 Bush, 387.

3. An acknowledgment that a party is satisfied, or a covenant not to sue, amounts to a release. "I acquit him of every demand I have against him," discharges the whole debt—the part past due, as well as that to fall due at a future day. *Arnold* v. *Park*, 8 Bush, 3. (Chitty on Contracts, 293).

4. Payments of interest by mistake, when none was due, are applied on the principal debt at the date of the maturity of the obligation. *Carr's ex'r* v. *Robinson & Dudley*, 8 Bush, 269.

5. If the parties agreed at the time the accounts were created that they should be regarded as payment on the notes, the statute of limitations does not apply to the accounts. *Wing, &c.* v. *Dugan*, 8 Bush, 583.

6. On the plea of payment, the jury should be allowed to take into consideration the lapse of time from the execution of the notes, the pecuniary condition of the parties, the business relations between them, as well as other facts and circumstances proven in the case. *Poston* v. *Smith's ex'r*, 8 Bush, 589.

7. The renewal of a note is not a payment; and the homestead will be subject to that part of the debt created before the passage of the act. *Kibbey* v. *Jones*, 7 Bush, 243.

8. Payment to plaintiff's attorney is payment to the plaintiff. *Ely, &c.* v. *Harvey, Keith & Co.*, 6 Bush, 620.

9. Indorsement of a partial payment on a note, shown to have been made by obligee in obligor's lifetime, is competent evidence that it was paid at date of indorsement. *Hopkins, &c.* v. *Stout*, 6 Bush, 375.

10. Where the creditor owes the debtor more than one debt, when he makes a payment he has a right to direct on which debt it shall be entered. If he fails to do so, the creditor may elect on which to place it; then the court will do so. If one debt bears interest and another not, the law presumes it to be the intention of the debtor to apply it to that one which bears interest. If one be older than the other, this will sometimes raise the presumption in favor of applying it to the elder. But if one is secured and another not, and no election by the creditor nor direction by the debtor, it will be applied to the debt not secured, because it is equitable and to the interest of the cred-

itor. *McDaniel* v. *Barnes, White & Co.*, 5 Bush, 183; *Nuttall's adm'r* v. *Brannin's ex'rs*, 5 Bush, 11.

11. Whether a promise to pay in cattle and horses implied an unconditional promise to pay, should be left to the jury to decide. *Warren* v. *Perry*, 5 Bush, 447.

PENALTIES.

Penalties will not be enforced, when compensation can be made. When they are to secure the payment of money, they will be relieved against, upon payment of principal and interest of the debt. (Story's Eq., 1314.) *Thomasson* v. *Townsend*, 10 Bush, 114.

PENDENTE LITE PURCHASER.

See PURCHASER.

PENITENTIARY.

1. Profits realized from the penitentiary are dedicated to the sinking fund, by the Constitution; but the legislature is not deprived of the power to regulate the management of the institution. *Commonwealth* v. *Todd, &c.*, 9 Bush, 708.

2. A contract with a lessee of the penitentiary did not *ipso facto* convert the stipulated rental into a part of the sinking fund; but the contract was subject to the control of the legislature. *Ibid.*

3. The liability of the lessee of the penitentiary to pay rent, depended upon his being permitted to employ the convicts at the most profitable labor, etc.—subject to the regulations prescribed by law. *Ibid.*

4. The Commonwealth had the right to make proper improvements; but, if the lessee is disturbed in his rights, he should not be compelled to pay full rental. *Ibid.*

5. The lessee had the right to set off such damages as he sustained, against the rent sued for by the Commonwealth. *Ibid.*

PENSION MONEY.

Pension money received from the United States is not liable to attachment, levy or seizure by or under any legal or equitable process whatever. Pension money can not be subjected to the payment of the debts of the pensioner. *Eckert & Co.* v. *McKee, &c.*, 9 Bush, 355.

PERJURY.

See CRIMINAL LAW AND PROCEEDINGS.

PLEADINGS IN CIVIL ACTIONS.

1. Petition; 2. Answer; 3. Reply; 4. Cross-Petition and Counter-Claim; 5. Demurrer; 6. Amendments; 7. Verification; 8. Failure to plead.

See EVIDENCE (9 Bush, 559); INJUNCTIONS (9 Bush, 745); JUDGMENTS (9 Bush, 665); NEW TRIAL (9 Bush, 738); and PARTIES (9 Bush, 765).

1. Petition.

1. A corporation may maintain an action in its own name on the official bond of one of its officers. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

2. In an action for damages for a breach of contract, where both parties should perform their parts at the same time, the petition must aver that plaintiff was ready to perform his part at the required time and place; or it will be fatally defective. *Sousely* v. *Burns' adm'r*, 10 Bush, 87.

3. The petition against heirs or devisees, in an action to recover from them a debt owing by the ancestor or devisor, should describe the particular property sought to be subjected; or allege that the heirs or devisees have received sufficient estate from the ancestor or devisor to pay the debt. *Trustees Ky. Female Orphan School* v. *Fleming, ex'r, &c.*, 10 Bush, 234.

4. The Code of Practice abolished all forms of pleading, and requires the petition to state plaintiff's cause of action, and the answer to contain "a denial of each allegation of the petition controverted by the defendant." *Harper* v. *Harper*, 10 Bush, 447.

5. A cause of action on a contract, and a cause of action for fraud or negligence connected with the contract, may be joined in one petition. *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

6. An allegation that C. and F. are indebted to B. in an amount sufficient to satisfy a certain judgment, imports no more as to F. than a separate indebtedness—which, together with the indebtedness of C., is sufficient to satisfy said judgment. *Warner* v. *Bryant*, 9 Bush, 212.

7. In an action on a covenant to pay $1,000 "if the sale is confirmed," the petition should have alleged that he had confirmed the sale, and stated the facts to show he had confirmed it; or have stated facts showing a sufficient legal reason for not doing so. Failing to make these allegations, the petition did not contain facts sufficient to constitute a cause of action. *Johnson* v. *Stokes*, 9 Bush, 279.

8. A petition, which alleged that appellee paid in full as surety for appellant a note—not made part of the petition, but filed with the affidavit for an attachment, and with the indorsement thereon that the payee assigned all his interest in the note to appellee, who was entitled to its entire proceeds—and which further alleged that no part of the note had ever been repaid by appellant, presents such a state of facts as would imply a promise to pay, and therefore sets out a good cause of action. The cause of action was not on the note, but on the assumpsit or implied promise. *Bridges* v. *Reed*, 9 Bush, 329.

9. Full names of persons set out in the caption makes them parties. *Neely, &c.* v *Merritt, &c.*, 9 Bush, 346.

10. The petition was not defective in failing to allege that there was no negligence on the part of the deceased contributing to the injury complained of. *Louisville & Portland Canal Co.* v. *Murphy, adm'r, &c.*, 9 Bush, 522.

11. Every fact necessary to enable the plaintiff to recover must be alleged. *Ibid.*

12. Negligence is a question of law as well as of fact. *Ibid.*

13. Where the law imposes a public duty it is unnecessary in pleading to allege it. *Ibid.*

14. A petition, by a stockholder in a corporation for establishing a school, to enjoin a purchase of land, was held to show no cause of action—because it did not allege that the lands were not to be held for the benefit of the school. *Dudley* v. *Ky. High School*, 9 Bush, 576.

15. In actions for causing death by negligence, the petition need not state the circumstances from which the neglect is to be inferred; it is sufficient to allege the extent of the injury and manner of its infliction, and to charge negligence in general terms. *Louisville, Cincinnati and Lexington R. R. Co.* v. *Case's adm'r*, 9 Bush, 728.

16. Whether the allegations of a petition are material or not, are questions to be decided by the court. It is necessary to allege in a petition that the killing was not in self-defense. *Becker, &c.* v. *Crow, &c.*, 7 Bush, 198.

17. If the writing sued on is set out, a misnomer of the writing is no cause of general demurrer. *Bradley* v. *Mason*, 6 Bush, 602.

18. The petition showed that the account sued on was apparently barred by limitation: Not demurrable. *Board* v. *Jolly*, 5 Bush, 86.

19. Defect of parties appearing on the face of the petition is cause of demurrer. (Civil Code, sec. 120, subsec. 4.) If it does not appear on the petition, may be taken advantage of by answer, and if in neither way it is waived. *Justice* v. *Phillips*, 3 Bush, 200.

20. Plaintiff must allege in his petition to enforce lien on baggage, that he is a tavern-keeper. *Southwood* v. *Myers*, 3 Bush, 681.

21. Petition did not allege that there was an ordinance authorizing the well to be dug at the cost of the property-owners, and was properly dismissed. *Babbitt* v. *Woolley, &c.*, 3 Bush, 703.

22. Demand and refusal to pay must be alleged, in a petition against a constable and his sureties for money collected by him. *Harris, &c.* v. *Perry*, 2 Bush, 101.

23. Petition alleged a balance of $620, without specifying articles sold. Answer denied that defendant owed more than $500. On the pleadings, plaintiff only entitled to judgment for

$500. A bill of particulars lodged with the petition but not filed nor made part thereof, is no part of the record. *Webb* v. *Jeffries, &c.*, 2 Bush, 221.

24. It is sufficient to allege when the note sued on is dated and when payable. *Burton, &c.* v. *White's adm'r*, 1 Bush, 9.

2. Answer.

1. The plea of *non est factum* must be made in affirmative language, and sworn to. *Trustees Kentucky Female Orphan School* v. *Fleming, ex'r, &c.*, 10 Bush, 234

2. A denial "of knowledge sufficient to form a belief" is insufficient. The Civil Code (sec. 125) requires "a denial of each allegation of the petition controverted by the defendant, or of any knowledge *or information* thereof sufficient to form a belief." *Ibid.*

3. The plea of no consideration for a written obligation does not cast the burden of proving the consideration upon the plaintiff. (Rudd v. Hanna, 4 Mon., 531; Taylor v. Ashby, 2 J. J. Marsh., 415.) *Ibid.*

4. Allegation in an answer that the defendant is an "innocent purchaser," is merely an averment of a conclusion of law. *Wing, &c.* v. *Hayden, &c.*, 10 Bush, 276.

5. The fact that a party is "defendant," and his petition an "answer," does not necessarily change his real attitude toward antagonistic parties. *Low & Whitney* v. *Blinco, &c.*, 10 Bush, 331.

6. But the creditor has a right to file his petition in such case, and demand that the grounds of defense be stated according to the rules of pleading. *Horner* v. *Harris' ex'r*, 10 Bush, 357.

7. Under the Civil Code, a party can not make defense without pleading it in some form. *Ibid.*

8. Matter which should come more properly from the defendant need not be stated by the plaintiff. *Louisville & Portland Canal Co.* v. *Murphy, adm'r, &c.*, 9 Bush, 522.

9. A defect in the petition is cured by the answer. *Ibid.*

10. Negligence of the driver of a street-car is no defense in an action against other persons, whose negligence caused the death of a passenger. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Case's adm'r*, 9 Bush, 728.

11. A petition, counter-claim or set-off, founded on an ordinary account for goods, will be construed to relate to it; and the answer, to be good, should controvert some material part of the actual or constructive averments of it. (18 B. Mon., 57; 2 Bush, 221; 16 B. Mon., 329.) *Thruston's adm'x* v. *Oldham*, 6 Bush, 16.

12. In an action for slander, defendant may rely on as many defenses as he chooses, whether inconsistent or not. (Civil Code, subsec. 4, of sec. 125.) *Horton* v. *Banner*, 6 Bush, 596. Plaintiff filed an amended petition, correcting a mistake as to style of suit before the justice. Plea of statute of limitations thereto not good. *Same*, 596.

13. That the vendors had no title to the slave, and had not and "could not and never have made a title to the vendee," not good in an answer. *Patrick, &c.* v. *Swinney*, 5 Bush, 421.

14. A denial which is not such as the Code requires, dispenses with proof. *Moorman* v. *Beauchamp*, 4 Bush, 145. An allegation, in the answer, that plaintiff had waived his lien, must be proved. *Same*, 145.

15. The court should ascertain the amount each heir has received by descent, and a several judgment be rendered against them. *Ransdell, &c.* v. *Threlkeld's adm'r*, 4 Bush, 347.

16. The answer not controverting the allegation of want of title in Wilson, and the owner's recaption of the stolen buggy, there was no necessity for a judicial eviction. *Dent* v. *McGrath*, 3 Bush, 174.

3. Reply.

1. Denials must be direct and specific, and the party having personal knowledge must admit or deny positively. *Wing, &c.* v. *Dugan*, 8 Bush, 583.

2. What is new matter, when pleaded as a counter-claim, may be treated as a reply. *Davis* v. *Dycus*, 7 Bush, 4.

3. A defendant cannot become an actor by a reply to a cross-petition or counter-claim. *Spalding* v. *Alexander, &c.*, 6 Bush, 160.

4. A reply to an answer, which was not a cross-petition and did not set up a counter-claim, was properly rejected. *Mason, &c.* v. *Mason, &c.*, 5 Bush, 187.

5. No reply is necessary to an answer relying on the statute of limitations. *Harris* v. *Moberly*, 5 Bush, 556.

6. A counter-claim cannot be pleaded in a reply. *Williams & Davis* v. *Jones and wife*, 1 Bush, 621.

4. Cross-petition and Counter-claim.

1. A cross-petition must set up a cause of action affecting the subject-matter of the action. (Civil Code, sec. 125.) *Royse* v. *Reynolds*, 10 Bush, 286.

2. One defendant to a suit cannot recover a judgment against a co-defendant, without a cross-pleading and service of process, or appearance by the defendant thereto. *Cavin & Elliott* v. *Williams & Ray*, 8 Bush, 343. This case overrules the case of Jenkins v. Smith, 4 Met., 380.

3. Allegation in a cross-petition that the plaintiff had not a good title, is admitted by a failure to answer. *Calhoon* v. *Belden*, 3 Bush, 674.

4. Allegations of a counter claim, if not replied to, are to be taken as confessed. *Cook* v. *Gray*, 2 Bush, 121.

5. A set-off relied upon in a cross-petition against other parties not before the court, cannot be taken for confessed against the plaintiff until the other parties are brought before the court or it is dismissed as to them. *Scott, &c.* v. *Wilson*, 2 Bush, 603.

5. Demurrer.

1. The filing of a demurrer and answer, at the same time, does not preclude the defendant from waiving his right to a trial upon the merits, and standing by his demurrer. In this case, the defendant stood by his demurrer; and thereby waived the benefit of his defense of limitation pleaded in his answer. *Bridges* v. *Reed*, 9 Bush, 329.

2. An order sustaining a demurrer to jurisdiction and awarding judgment for costs, is a final order. *Dudley* v. *Ky. High School*, 9 Bush, 576.

3. A demurrer admits the facts charged, but only to test the law on such facts; and if it be overruled, the admission is no longer binding. *Commonwealth* v. *Jones*, 10 Bush, 725.

4. If non-joinder of defendant appears on the face of a petition, objection must be made by demurrer. If the non-joinder appears by evidence, the defect must be relied on in the answer;

or it will be regarded as waived. (Albro v. Lawson, 18 B. Mon., 642; Civil Code, sec. 123.) *Waits* v. *McClure*, 10 Bush, 763.

5. A demurrer to all the paragraphs of an answer should not be sustained, if any one imports a bar to the action. *Archer* v. *National Ins. Co.*, 2 Bush, 226.

6. A demurrer to the petition, upon the ground that it discloses a bar by the statute of limitations, cannot be sustained, unless the petition shows the non-existence of any ground of avoidance. *Rankin* v. *Turney*, 2 Bush, 555.

6. Amendments.

1. See INTERLINEATIONS IN PLEADING.

2. It is not error to refuse leave to file amended answers—which do not present a defense to the action, nor are admissible as perfecting any defense set up or attempted to be set up in the original answers. *Gaar, &c.* v. *Louisville Banking Co.*, 11 Bush (Sept. 9, 1875).

3. Where a new cause of action is set out in an amended petition, summons must be issued and served. *Cecil* v. *Sowards, &c.*, 10 Bush, 96.

4. Matter brought into a suit by amended pleading, will not relate back to the time of the filing of the original. (Stone, &c. v. Connelly, 1 Met., 656; Dudley v. Price, 10 B. Mon., 88.) *Hawes, &c.* v. *Orr, &c.*, 10 Bush, 431.

5. The allegation of willful neglect by amended petition, is not the setting up of a new cause of action. *Lou., Cin. and Lex. R. R. Co.* v. *Case's adm'r*, 9 Bush, 728.

6. Process must be issued on amended pleadings presenting new and distinct causes of action. *Rutledge* v. *Vanmeter*, 8 Bush, 354.

7. Plaintiffs have the right, before answer, to file amended petition alleging material facts, and the court has no judicial discretion to reject it. *Champion, &c.* v. *Robertson*, 4 Bush, 17.

8. Amended petition filed, describing property: No lien is created on it, without order of attachment and levy thereon. *Phelps* v. *Ratcliffe*, 3 Bush, 334.

7. Verification.

Upon exceptions to the master's report in settlement of decedent's estate, the sufficiency of verification and proof of claims

may be inquired into, and their merits passed upon. *Horner* v. *Harris' ex'r*, 10 Bush, 357.

8. Failure to plead.

1. Equitable defense must be made in ordinary action, otherwise it will be waived. (Civil Code, sec. 14.) *Thomasson* v. *Townsend*, 10 Bush, 114.

2. A contractor, claiming for extra work, should allege an independent agreement, in order to avoid the stipulations in the covenant against such claim; but, after verdict, the omission is aided by the common law intendment. *Escott & Son* v. *White, &c.*, 10 Bush, 169.

3. It is too late, after verdict, to object that the blanks in the petition were not filled, or that it contained redundant matter. *Elizabethtown & Paducah R. R. Co.* v. *Pottinger & Bro.*, 10 Bush, 185.

POSSESSION.

1. See CURTESY (9 Bush, 679); and LIMITATIONS (9 Bush, 629).

2. A grantor, remaining in possession under a verbal agreement, cannot avail himself of the statute of limitations. *Carpenter, &c.* v. *Carpenter*, 8 Bush, 283. And his declarations while in possession, as to his manner of holding, are incompetent, unless made in the presence of the grantee. *Same*, 283.

3. Continued and exclusive possession from 1812 to 1862, gave a possessory title, if not a fee. *Holmes' heirs* v. *Gay's heirs*, 6 Bush, 47.

4. Possession under a parol contract of purchase held to be notice to creditors of vendor. *Crawford* v. *Woods, &c.*, 6 Bush, 200.

5. Possession restored by delivering the key of the house. *Haupt* v. *Pittaluga*, 6 Bush, 493.

6. Possession is incidentally involved in the issue of title. *Owens* v. *Rawleigh*, 6 Bush, 656.

7. Possession acquired and held under a life-tenant, can not be adverse during his lifetime, as to those entitled to the remainder or reversion. *Simmons, &c.* v. *McKay, &c.*, 5 Bush, 25.

8. Possession of wife's land by vendee of husband, does not become adverse until his death. *Stephens* v. *McCormick, &c.*, 5 Bush, 181.

9. Possession must accompany sale of personal property; otherwise sale will be void as to creditors, although the contract contains a stipulation that the seller is to retain possession until a future day. *Morton* v. *Ragan & Dickey*, 5 Bush, 334. But this rule does not extend to a growing crop, nor to a sale of property exempt from sale under execution. *Same*, 334.

10. Occupant improving land in good faith, believing it was his own, being evicted by a superior title, is entitled to ameliorations, so far as they have advanced the value of the land. *Pulliam, &c.* v. *Jennings*, 5 Bush, 433.

11. Possession of land acquired after the levy of executions thereon, not adverse to the purchaser under the executions. *Daniel* v. *McHenry*, 4 Bush, 277.

12. Possession under a contract of purchase, is constructive notice of claim to the land. *Goins* v. *Allen, Morton & Co.*, 4 Bush, 608.

13. Seizin, in its technical sense, is actual or constructive possession under a perfect legal title, and includes as an essential element an actual entry also. *McMillan's heirs* v. *Hutcheson, &c.*, 4 Bush, 611.

14. "Seized" as used, in 1794, in a power of attorney given by a non-resident to sell lands of which he was then seized in Kentucky, construed to have meant possessed, or entitled to, and included land surveyed but not patented. *Same*, 611. And a party holding under a patent void by the statute of 1835, stands as if no survey had been made or patent issued. *Same*, 611.

15. Possession of a purchaser under a decree for distribution, is adverse to the original title-holders and distributees. *Conner and wife* v. *Downer, &c.*, 4 Bush, 631.

16. Persons in possession, not as tenants of any one, but who took leases from one who asserted title to the land, are estopped to deny his title. *Patterson, &c.* v. *Hansel, &c.*, 4 Bush, 654.

POWER OF ATTORNEY.

1. See HUSBAND AND WIFE.

2. Where a power is given to sell several contiguous pieces or tracts of land—in order to avoid the consequences of forced sales upon short time—"on such terms as the attorneys in fact thought most beneficial to all parties in interest," and to convey the same "with clause of general warranty," the agents and purchaser having construed it as giving power to sell all in one tract, and acted on that construction, those who executed the power are bound by the sale. (Vesey v. Levy, 13 Howard, S. C., 359; LeRoy v. Beard, 8 Howard, S. C., 451; Loraine v. Cartwright, 3 Washington, C. C. R., 151.) *Reed, &c.* v. *Welsh, &c.*, 11 Bush (Oct. 22, 1875).

3. A power of attorney is not a deed of trust, unless the property is changed and the title is vested in the grantee; unless words of grant are used, and an interest in the property is conveyed. (Harrison v. Hobbs, 1 Bibb, 152; Hunt v. Rousmanier, 8 Wheaton, 174.) *Ibid.*

4. It does not follow—because a trust attaches to the proceeds of a sale made under a power of attorney to sell lands to pay certain specified debts, &c.—that, therefore, the attorneys took an interest in the land, under and by virtue of the power. *Ibid.*

5. By the exercise of a power of attorney to sell lands, the attorney acquires an interest in the purchase money, but never had any interest in the land derived from the power. *Ibid.*

6. Though a power of attorney may confer on an agent the fullest authority and discretion, it will not protect him from responsibility if he acts unfaithfully or grossly mismanages the business intrusted to him. *Myles' ex'rs, &c.* v. *Myles*, 6 Bush, 237.

7. An agent is held personally responsible for a loss resulting from his infidelity to his principal. *Phillips* v. *Skinner*, 6 Bush, 662.

8. W. P. authorized his attorney in fact "to indorse any paper, renewing any paper on which I am responsible as surety of Jno. P., and to render me liable as surety for same on any new paper hereafter to be negotiated by any banking corpora-

tion, &c., not exceeding $20,000." *Held*—that the attorney in fact had the right to renew any old paper, and bind principal on new paper as surety of Jno. P. for $20,000. *Preston* v. *Henning & Speed*, 6 Bush, 556.

9. Issue of a summons is the commencement of an action. *Butts* v. *Turner & Lacy*, 5 Bush, 435.

10. Subsequent acknowledgment and ratification of authority —so as to sanction an unauthorized act such as signing a note— will bind as if the party signing was originally authorized. *Forsythe* v. *Bonta*, 5 Bush, 547.

11. Real estate agents for one party, in the sale or exchange of property, can not represent the other party in the same transaction; and cannot demand and recover commission from both parties. *Lloyd* v. *Colston & Moore*, 5 Bush, 587.

12. Authority to sign names to bond of W. J. B., sheriff elect of H. county, Sept., 1865, did not authorize attorney to sign names of his principals to old revenue bond of B., executed in Feb., 1865. *Commonwealth* v. *Adams, &c.*, 3 Bush, 41.

13. A note executed by the son of an adjudged lunatic as her agent is void. *Lee, committee* v. *Morris*, 3 Bush, 210.

14. Knocking down goods sold to the highest bidder by an auctioneer, and inserting his name in a book or memorandum as such, when so made will bind both parties; and unless he discloses the name of his principal when he sells, he will be regarded as the vendor. *Thomas* v. *Kerr*, 3 Bush, 619.

15. A conveyance made and accepted purported to be the act of the agent and not of his principal; although it does not pass the legal title, binds the principals as their bond for title. *Casey, &c.* v. *Lucas*, 2 Bush, 55.

PRACTICE IN CIVIL ACTIONS, IN CIRCUIT COURTS.

1. See LIMITATION; NEGLIGENCE; and PARTIES TO ACTIONS.

2. Where orders and levies are *prima facie* valid and regular, they must be so treated, unless a motion be made to quash or suppress them. *Smith* v. *Belmont & Nelson Iron Co., &c.*, 11 Bush (Oct. 13, 1875).

3. No judgment can be rendered against a defendant summoned without the county in which the action is brought, unless

the case is ready for judgment against a defendant summoned within the county. (Civil Code., sec. 108.) *Duckworth* v. *Lee*, 10 Bush, 51.

4. Land must be identified in the judgment directing it to be sold. *Runyon* v. *Darnall*, 10 Bush, 67.

5. The court first acquiring jurisdiction can not be ousted. *Hawes, &c.* v. *Orr, &c.* 10 Bush, 431.

6. On a motion for a new trial, the court should review all its rulings excepted to by the unsuccessful party, and if error has been committed to his prejudice, grant a new trial; a refusal to do so will be error for which the order will be reversed, and the cause remanded for a new trial. *Harper* v. *Harper*, 10 Bush, 447.

7. The same evidence of fraud is required to satisfy a chancellor as to satisfy a jury. *Marksbury, &c.* v. *Taylor, &c.*, 10 Bush, 519.

8. Failure to establish an immaterial averment does not militate against the right of the plaintiff to recover. *Louisville & Nashville R. R. Co.* v. *Goodnight, &c.*, 10 Bush, 552.

9. Section 111 of the Civil Code was intended to liberalize, and not to make the rules of practice more technical and restricted than they were before. *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

10. Under the former classification of forms of actions, an action for negligence or fraud would have been in form *ex delicto*. *Jones, assignee, &c.* v. *Johnson, &c.*, 10 Bush, 649.

11. Individual contract alleged; partnership contract proven. *Held*—that failure to declare upon it as a partnership liability was not a ground of non-suit. *Waits* v. *McClure*, 10 Bush, 763.

12. Courts of chancery jurisdiction have power to order a matter of fact strongly controverted to be tried by a jury. *Crabb* v. *Larkin, &c.*, 9 Bush, 154.

13. When two depositions are given by a witness, and one only was read in the court below, both depositions being copied in the record, the bill of exceptions should show which one was read. *Ibid.*

14. Deposition read by defendant, after his objection to plaintiff's reading it had been sustained: The plaintiff could not com-

plain of this, as the defendant did what the plaintiff wanted done. *Ibid.*

15. Objection must be made to the reading of depositions. *Crabb* v. *Larkin, &c.*, 9 Bush, 154.

16. A judgment of a court of concurrent jurisdiction directly upon the point is, as a plea in bar or as evidence, conclusive between the same parties upon the same matter directly in question in another court. *Ibid.*

17. A judgment of court and record, in a suit on promissory notes against one party, can not be read by the plaintiff as evidence in another action on the same notes, against another defendant who was not a party to the first suit. *Ibid.*

18. When the mandate of the court of appeals orders the entering of a certain judgment, it is not error to refuse permission to the defendants to file an amended answer setting up facts sufficient to authorize the vacating of the judgment, if rendered. The judgment ordered by the mandate should be entered; the grounds for vacating it may then be set up by petition (Civil Code, sec. 579); and a new trial may be granted as prescribed in the Code (sec. 373). *Scott, &c.* v. *Scott's ex'r, &c.*, 9 Bush, 174.

19. Whether a contract was in writing as alleged, or oral, was a matter to be considered by the jury. *Keith's ex'r, &c.* v. *Hinkston*, 9 Bush, 283.

20. A defective pleading may be aided by intendment after verdict. *Louisville & Portland Canal Co.* v. *Murphy, adm'r, &c.*, 9 Bush, 522.

21. Where the facts are conceded upon which the question of negligence is based, it then becomes a question of law as to whether a case of negligence has been made out. *Ibid.*

22. The case should go to the jury when there is any proof conducing to sustain the cause of action. *Ibid.*

23. A non-suit should be ordered if the charge is willful negligence, and the evidence fails to show it. *Ibid.*

24. A peremptory instruction should have been given, in this case, to find for the defendant—plaintiff having failed to show any right to recover damages. *Ibid.*

25. The allegation of willful negligence against a railroad company includes all the inferior grades, and the jury must

assess the damages according to the provisions of the act itself. *Lou., Cin. and Lex. R. R. Co.* v. *Case's adm'r*, 9 Bush, 728.

26. The power of the court to require special findings by the jury upon particular questions of fact, is to be exercised at the discretion of the court. *Ibid.*

27. The measure of damages for death caused by negligence is the value of decedent's power to earn money; it is error to instruct the jury that upon proof of simple negligence they may give "such damages as they may deem just and proper by way of compensation, not exceeding the amount claimed in the petition." *Lou., Cin. & Lex. R. R. Co.* v. *Case's adm'r*, 9 Bush, 728.

28. Where questions of fact are submitted to the court, the judgment of the court can not be disturbed on the sole ground that it is contrary to the weight of evidence, for a less reason than a verdict can be disturbed. *Mulholland & Bros.* v. *Samuels*, 8 Bush, 63.

29. A lessee may sue a sub-lessee or assignee on covenants to pay rental to him; and a lessee being sued, may bring a cross-action against his assignee. *Trabue* v. *McAdams*, 8 Bush, 74.

30. Witnesses should be separated, on the motion of either party. *Walker* v. *Commonwealth*, 8 Bush, 86.

31. Plaintiff can not dismiss his action for personal property, after executing bond as required by sec. 211, Civil Code, and obtaining possession of the property. *Rogers* v. *Bradford*, 8 Bush, 163.

32. In an action for personal property, the judgment should be in the alternative. *Same*, 163.

33. Pleadings will be construed most strongly against the pleader. *Commonwealth* v. *Cook, &c.*, 8 Bush, 220. Pleas should state facts, and not conclusions of law. *Same*, 220.

34. One defendant can not recover judgment against a co-defendant, without a cross-pleading and service of process. *Cavin & Elliott* v. *Williams & Ray*, 8 Bush, 343. And suit by vendor to enforce lien, making another holder of one of the notes a defendant, he may enforce lien therefor on making vendee a party to the answer and cross-petition, and service of process thereon; and vendor must make and tender a good deed. *Same*, 343.

35. Process must be issued on amended pleadings, presenting new and distinct causes of action. (6 B. Mon., 141.) *Rutledge* v. *Vanmeter*, 8 Bush, 354.

36. Depositions taken in another suit between the same parties, in relation to the same subject-matter in controversy, are admissible in evidence, even without proof of the death or absence of the witness from the State. *Roots* v. *Merriwether*, 8 Bush, 397.

37. The law of another State, when relied on, must be pleaded as a fact. *Same*, 397.

38. When a statute provides a remedy, the party seeking to obtain it must comply strictly with its provisions. *Maddox, &c.* v. *Fox, &c.*, 8 Bush, 402.

39. In a suit for discovery, on a return of no property found, the plaintiff must allege that the execution issued to the county of defendant's residence, or where the judgment was rendered. *Same*, 402.

40. Known defenses must be relied on, before judgment; and party will not be permitted to open judgment to plead statute of limitations. *Dickinson, &c.* v. *Trout, &c.*, 8 Bush, 441.

41. Suggestion of female parties is sufficient to enable the court to make their husbands parties; and by executing a bond in court, sureties become *quasi* parties, and may be proceeded against by rule. *Same*, 441.

42. A special judge may try a cause although one of the parties did not consent to his election. Time given to complete bill of exceptions must fix some day of the next term, and party does not waive his right to except to the filing because his attorney assisted in making it out. *Smith, &c.* v. *Blakeman*, 8 Bush, 476.

43. Denials in an answer must be specific and direct, and the party having personal knowledge must either admit or deny. *Wing, &c.* v. *Dugan*, 8 Bush, 583.

44. Objection and exceptions to giving or refusing instructions not necessary. Exception alone sufficient. *Poston* v. *Smith's ex'r*, 8 Bush, 589. Long v. Hughes, 1 Duvall, 387, overruled.

45. Errors as to the form of proceeding are waived by a submission of the case without objection. (1 Met., 593.) *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

46. If no motion is made to compel plaintiff to elect before defense, the objection to the misjoinder is waived. *Same*, 636.

47. The common law will be presumed to prevail in another State, nothing to the contrary being shown. *Honore* v. *Hutchings*, 8 Bush, 687.

48. Equitable ownership of land, not a good defense to an action of trespass by plaintiff in possession; nor ought such an issue to be transferred to the equity docket. *Creager, &c.* v. *Walker, &c.*, 7 Bush, 1.

49. Commissioner's deed made to plaintiff after his death, without revivor, did not pass the legal title. *Gill* v. *Hewett*, 7 Bush, 10.

50. Costs of an action to quiet title, should be adjudged against the unsuccessful party. *Moore, &c.* v. *Boner, &c.*, 7 Bush, 26.

51. Discovery of a fact after submission, which will be unavailable on the trial, no ground for setting aside the submission. *Larue, &c.* v. *Hays, &c.*, 7 Bush, 50.

52. Party guilty of want of diligence in not attending court or providing other counsel, can not avail himself of the sickness of one of his attorneys as a cause for new trial. *Landrum* v. *Farmer*, 7 Bush, 46.

53. The facts of heirship should be averred and proved. (4 J. J. M., 649; 5 J. J. M., 145.) *Larue, &c.* v. *Hays, &c.*, 7 Bush, 50.

54. Each party interpleaded must claim a right, without collusion, in the subject-matter of the suit. *Starling* v. *Brown, assignee, &c.*, 7 Bush, 164.

55. Exceptions to testimony must be taken at the proper time. *Hellburn & Co.* v. *Mofford, &c.*, 7 Bush, 169.

56. Whether allegations are material or not, are questions of law to be decided by the court. *Becker, &c.* v. *Crow, &c.*, 7 Bush, 198.

57. Where a case is referred to a commissioner, with numerous directions as to facts to be ascertained, the principles by which the commissioner should be governed in the application of the facts should also be stated. *Riddle, &c.* v. *Lewis*, 7 Bush, 193.

58. The court should say what is and what is not competent evidence. *Becker, &c.* v. *Crow, &c.*, 7 Bush, 198.

59. To correct errors of the circuit court—which might have been grounds of a reversal in the court of appeals, in an action for a modification of the judgment—is not the appropriate remedy. *McCown* v. *Macklin's ex'r*, 7 Bush, 308.

60. If it appears that no cause of action is set forth against the defendant served with a summons in the county in which the action is brought, it will be erroneous to render judgment against a defendant served in another county. (Civil Code, sec. 108.) *Meguiar* v. *Rudy*, 7 Bush, 432.

61. Judgment by default against the defendant served in the county is not of itself sufficient. *Same*, 432.

62. When plaintiff files with his petition the affidavit prescribed in sec. 439, Civil Code, the petition is to be taken as confessed unless denied by answer. *Tipton* v. *Wright*, 7 Bush, 448. Answer of defendant cannot be filed without entering appearance. *Same*, 448.

63. Appearing, without objecting to the jurisdiction of the court, is a waiver of objection to changing venue. *Vinson* v. *Lockard & Ireland*, 7 Bush, 458.

64. Papers are not a part of the record, unless identified by bill of exceptions or by order of court. *Young, McDowell, & Co.* v. *Bennett, &c.*, 7 Bush, 474.

65. Distributees cannot recover a joint judgment against the administrator for an alleged balance of their several shares of an estate. *Pelly* v. *Bowyer, &c.*, 7 Bush, 513.

66. The pleadings may be oral, when the matter in controversy does not exceed $50. *Wilson* v. *Commonwealth for use of Klette*, 7 Bush, 536. The proceedings in penal cases are regulated by the Civil Code of Practice. (Criminal Code, sec. 8.) *Same*, 536.

67. A proper foundation must be laid for the introduction of parol proof of the contents of lost records. *Penny, &c.* v. *Pindell, &c.*, 7 Bush, 571.

68. Defendant filed with his answer plaintiff's receipt, which was *prima facie* evidence of payment of the demand sued for; the *onus* was thrown on plaintiff, and if obtained by fraud, he

could show it without replying or filing an amended pleading. *Robinson* v. *Williamson*, 7 Bush, 604.

69. A reason should be given—in an amended answer offered to be filed after judgment—for failure to allege the entire matter of defense in the original answer. *Mount* v. *Tappey*, 7 Bush, 617.

70. An amended answer allowed to be filed, to deny a fact which was admitted by the original answer by mistake. *Downing* v. *Bacon, &c.*, 7 Bush, 680.

71. Plaintiff, in proceedings for discovery, &c., on return of no property found, makes persons severally defendants, and alleges that they are indebted to the execution debtor in specific sums: authorizes judgments against them by default, after being summoned. *Joyce* v. *O'Toole, &c.*, 6 Bush, 31.

72. If different causes are joined, that cannot be under sec. 111, Civil Code, the Court may compel plaintiff to elect upon which he will proceed. Each cause of action should be distinctly numbered. (Civil Code, 119.) *Bonney, &c.* v. *Reardin, &c.*, 6 Bush, 34. The husband promised to pay a debt created by his wife before their marriage, while she was an infant; and he said, on consultation with her, the account was correct. The evidence was properly admitted, and the jury might infer from the account itself that part of it was for necessaries. *Same*, 34.

73. Joint judgment proper against joint defendants, who jointly answer and claim the land jointly. *Holmes' heirs* v. *Gay's heirs*, 6 Bush, 47.

74. Action may be brought against any or all of joint obligors. (Civil Code, sec. 39.) *Gossom* v. *Badgett*, 6 Bush, 97.

75. The cause of action alleged in the pleadings must be proved; and allegations unproved are not a variance but a failure of proof. Proof of a separate agreement, where a joint one alleged, a failure of proof. *Same*, 97.

76. Whether the material facts alleged in the answer were specifically denied by the reply, was a question to be decided by the court. *Yeiser & Wells* v. *Brown*, 6 Bush, 190.

77. Transfer to equity not allowed, where one of the defenses was legal and one equitable. The defendant had the right to have the equitable defense transferred. *Bennett and wife* v. *Titherington, &c.*, 6 Bush, 192.

78. Court cannot render judgment to sell land for installments not due. *Burton* v. *McKinney*, 6 Bush, 428.

79. Infant desiring to rescind contract of sale of a horse on the ground of fraud, must tender back the horse. *Bryant, &c.* v. *Pottinger, &c.*, 6 Bush, 473.

80. Non-payment admitted. Plea of statute of limitations sustained, notwithstanding. *Gray, &c.* v. *McDowell, &c.*, 6 Bush, 475.

81. Failure to answer, in action for damages: jury necessary. *Wood* v. *Morgan*, 6 Bush, 507.

82. Offer to perform, not equivalent to performance. *Same*, 507.

83. Essential averments, in the body of the petition, cannot be supplied by merely referring to another paper, though it be the foundation of the action. *Murphy* v. *Estes*, 6 Bush, 532.

84. In an action on a lost note, or in possession of an adverse claimant who is a non-resident, the defendant in equity may properly demand an indemnifying bond. *Berry* v. *Berry's ex'r*, 6 Bush, 594.

85. Change of venue, by agreement of parties, to a circuit court to which by law it would not have been sent, is binding. *Salter* v. *Salter, &c.*, 6 Bush, 624.

86. Special judge selected by agreement of the parties, acting without being sworn: if acquiesced in at the time, objection thereto is waived. *Same*, 624.

87. The issue of title involves the question of possession; and neither party should be allowed to relitigate the same matter of controversy, by an independent suit, unless on some of the grounds for a new trial. *Owens* v. *Rawleigh*, 6 Bush, 656.

88. When the condition of a married woman does not appear in the proceedings against her, on her petition the court should grant a new trial, &c., according to the rights of the parties. *Mitchell, &c.* v. *Moore, assignee, &c.*, 6 Bush, 659.

89. Rehearing improperly granted: judgment reversed and original judgment restored. *Phillips* v. *Skinner*, 6 Bush, 662.

90. It is not proper to instruct the jury that when witnesses are equally credible, the greatest weight ought to be given to those who have the best opportunity to know and learn the facts. *Weil & Bro.* v. *Silverstone, &c.*, 6 Bush, 698.

91. Having laid the proper foundation in his answer, the administrator may, at any time before trial, have a rule against plaintiff to show that he had made demand of the claim sued on. (Civil Code, sec. 573.) *Nuttall's adm'r* v. *Brannin's ex'rs*, 5 Bush, 11.

92. Change of venue, although irregular, is not void, and the irregularity may be cured by supplying the proper affidavits to the court to which it is moved. (Myers' Sup., 82.) *Triplett* v. *Scott*, 5 Bush, 81. (2 Bush, 555.)

93. Lien and counter-claim for an attorney's fee being left blank in the answer, and not responded to, should be inquired of by a jury. *Wintersmith* v. *Tabor*, 5 Bush, 105.

94. Provocation so recent, as to induce a presumption that the violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff, may be proved; but not what took place months before. *Slater* v. *Sherman*, 5 Bush, 206. The defendant filed an affidavit, stating that he could prove by an absent witness, that a witness relied on by plaintiff was not present when the alleged trespass was committed: not sufficient to authorize a continuance. *Same*, 206.

95. Any defendant has a right to demand the trial of issues purely equitable, in an ordinary action. *Commonwealth for Peters* v. *Bosley, &c.*, 5 Bush, 221.

96. A sheriff failed to collect or return, as required by law, an execution against the administrator, in favor of a receiver appointed to receive and pay over to creditors. The administrator paid off some of the creditors. The sheriff permitted him to plead such payments as an equitable defense *pro tanto*. *Same*, 221.

97. In an action on an obligation to deliver one barrel of whisky at $3 per gallon, proof ought to be made of the value of the whisky. *Beam* v. *Hayden* 5 Bush, 426.

98. The issue of the summons is the commencement of an action. *Butts* v. *Turner & Lacy*, 5 Bush, 435.

99. Where the amount of the debt is specifically set out, judgment should be rendered without the intervention of a jury. *Field* v. *Montmollin*, 5 Bush, 455.

100. Defendants cannot contradict by proof, what they have admitted to be true in their answer. *Sandford, &c.* v. *Smith, &c.*, 5 Bush, 471.

101. A plaintiff who files his petition under the act of March 10, 1856 (1 Stanton's Rev. Stat., 553), cannot dismiss his petition so as to defeat other creditors, parties thereto, who have presented and filed their claims. *Sawyers, &c.* v. *Langford, &c.*, 5 Bush, 539.

102. A party may, by subsequent acts, ratify the execution of a note by a person who had no authority to do so. *Forsythe* v. *Bonta*, 5 Bush, 547.

103. When the statute of limitations is pleaded as a bar to an action, no reply is necessary. *Harris* v. *Moberly*, 5 Bush, 556.

104. A party asking for an instruction which is erroneous or to his prejudice, may, before the trial is concluded, ask for one correcting it and properly expounding the law. *Oneal* v. *Orr*, 5 Bush, 649.

105. Under the general issue, the court properly allowed and considered the special finding of the jury, to the effect that the action was based on a gambling transaction. *Alfriend, &c.* v. *Hughes*, 4 Bush, 40.

106. A party not liable for a debt, being sued and put off his guard by the plaintiff or his attorney, which prevents him from defending the action, entitles him to relief. *Hayden, &c.* v. *Moore*, 4 Bush, 107.

107. The heirs are liable severally for the amount each has received by descent, at the suit of a creditor of the decedent. *Ransdell, &c.* v. *Threlkeld's adm'r*, 4 Bush, 347.

108. The provisions of sec. 473, Civil Code, requiring a demand from an administrator before suit, do not apply to actions against heirs. *Johnson, &c.* v. *Belt*, 4 Bush, 405.

109. That a special judge took the oath will be presumed; but if the order of court does not show it, no such presumption indulged. Consent cannot be presumed against married women or infants. *Rudd, &c.* v. *Woolfolk, &c.*, 4 Bush, 555.

110. If the preponderance of proof or rational inference as to any fact on which the plaintiffs' title depends, be not on their side, the jury ought not to find for them. *Patterson, &c.* v. *Hansel, &c.*, 4 Bush, 654.

111. Commissioner's duty is to report facts, not to dictate decision of court. *Storms* v. *Storms*, 3 Bush, 77.

112. On a plea of probable cause, the defendant's attorney has a right to conclude the argument to the jury. *Brown* v. *Morris*, 3 Bush, 81.

113. A defective appeal bond in the circuit court being executed, appellant should be allowed to execute a new bond. *Manier* v. *Lindsey*, 3 Bush, 94.

114. Dismissing an appeal, remits the party to his original judgment. *Same*, 94.

115. A court of equity can enjoin either party from cutting timber, or otherwise intruding on a strip of land claimed by each party. *Peak, &c.* v. *Hayden, &c.*, 3 Bush, 125.

116. A married woman whose husband has abandoned her, has a right to use his name in a suit without his consent. *Stith* v. *Patterson, &c.*, 3 Bush, 132.

117. To recoup damages resulting to the vendee of personal property from the failure of consideration by plea, saves costs and prevents uncertainty. *Miller* v. *Gaither*, 3 Bush, 152.

118. Failing to make a motion to dismiss appeal because copy of record was not filed in time, until after the cause was submitted for final hearing, is a waiver of the right. *Bixler's adm'x* v. *Parker, &c.*, 3 Bush, 166.

119. An appeal prosecuted in the name of a defendant constructively summoned, without his knowledge, should not be regarded as an appearance by him. *Park's ex'r* v. *Cooke*, 3 Bush, 168.

120. A decree against infants, in favor of an unsued intervenor, without service of process on a cross-petition or order making him a party, good cause for revision in the circuit court. *Peak, &c.* v. *Percifull, &c.*, 3 Bush, 218.

121. On motion to strike defendant's answer from record for want of verification, he should be permitted to swear to it. Rule should be made requiring defendant to swear to answer. *Wheeler* v. *Wales*, 3 Bush, 225.

122. Additional property, mentioned in an amended petition, creates no lien without an order and levy of an attachment. *Phelps* v. *Ratcliffe, &c.*, 3 Bush, 334.

123. The Code requires all defenses to be pleaded to an action at law; and an equitable right, thus available, may be lost unless thus litigated. *Hackett* v. *Schad*, 3 Bush, 353.

124. The non-responsibility of the defendant for injuries complained of being established by uncontradicted evidence, court should instruct as in case of non-suit. *Parker* v. *Jenkins*, 3 Bush, 587.

125. All objections to a defense pleaded as a counter-claim and set-off, which was not connected with the note sued on, is waived by a replication and issue. *Boyd* v. *Day & Gorrell*, 3 Bush, 617.

126. The delay of two years without any step taken in the case deprives the plaintiffs of the benefit of a *lis pendens*. *Petree & Bristow, &c.* v *Bell, &c.*, 2 Bush, 58.

127. Allowance, by circuit court, to guards for guarding jail, only *prima facie* evidence of its correctness. *Hicknan Co. Court* v. *Moore, &c.*, 2 Bush, 108.

128. A judgment for a specific thing, in detinue or replevin, entitles the successful party to its value if it be not restored, which must be assessed by the jury. *Bates* v. *Buchanan*, 2 Bush, 117.

129. Where there is any evidence conducing to show a right of recovery, an instruction to find for the defendant is erroneous. *Stephens* v. *Brooks*, 2 Bush, 137.

130. A suit on an account filed with the petition needs no proof if defendant fails to answer. (15 B. Mon., 628.) *Wood* v. *Wells, &c.*, 2 Bush, 197. And the statement of two grounds of attachment in the alternative is sufficient. *Same*, 197.

131. Money in court, claimed by more than one party: When the pleadings and evidence justify it, the jury should find a general verdict, and the court order the money to be paid over accordingly. *Davis* v. *Watkins, &c.*, 2 Bush, 224.

132. Widow fails to answer to suit of administrator to settle insolvent estate. Land is sold, and before proceeds are divided, she claims her dower. Its value should be allowed her out of the proceeds before distribution. *Merriwether* v. *Sebree, &c.*, 2 Bush, 232.

133. Purchaser of land at commissioner's sale may, by motion, compel tenant to pay him rent. *Cooper* v. *Baker*, 2 Bush, 244.

134. A suit in equity is appropriate against a guardian, to compel a settlement of his accounts; and a settlement in the county

court pending the suit in equity will not bar it. *Commonwealth for use of Hooper, &c.* v. *Henshaw, &c.*, 2 Bush, 286.

135. After a transfer of a suit by the plaintiff to a third person, not a party thereto, and defendant notified thereof, he cannot compromise with plaintiff for a dismissal of the action. *Cantrell* v. *Hewlett, &c.*, 2 Bush, 311.

136. Exceptions to a commissioner's report admit everything not excepted to. Formal depositions before an examiner are not necessary, nor need to be otherwise certified than by the master in his report. *Taylor* v. *Young's adm'rs*, 2 Bush, 428.

137. Where the legal title to land is in a trustee, he shall be a party to the proceedings for its sale; and shall give bond and security, where the proceeds are to go into his hands. *Parks, &c.* v. *Fry*, 2 Bush, 433. (Civil Code, sec. 545.)

138. Real estate not susceptible of division, without material impairment of its value, may be sold, by the act of Feb. 15, 1866. (Myers' Sup., 751.) *Cromwell's heirs, &c.* v. *Mason's heirs, &c.*, 2 Bush, 439.

139. Proof showed that services were rendered in 1864, but petition alleged in 1863. *Held*, no variance. *Gentry* v. *Doolin*, 1 Bush, 1.

140. Paper referred to, but not filed before trial, cannot be read without proof of execution. *Same*, 1.

141. A personal judgment cannot be given against a husband, without allegation or proof that he had received estate by the wife to pay the debt sued for—being a debt of his wife before marriage. *Agnew and wife* v. *Williams*, 1 Bush, 4.

142. Sale by a commissioner is not concluded till ratified by the court. And sale made in execution of a trust quashed for inadequacy of price. *Egard* v. *Chearnly, &c.*, 1 Bush, 12.

143. Plaintiffs must allege that the party with whom defendant contracted had transferred the benefit of their contract to plaintiffs. *Miller, &c.* v. *Rice*, 1 Bush, 70.

144. A husband seeking divorce on ground of abandonment, must allege and prove that it was without his fault. *Epling* v. *Epling*, 1 Bush, 74.

145. Exoneration of principal on a plea of *non est factum* will not *per se* exonerate surety. *Dillingham* v. *Mudd, &c.*, 1 Bush, 102.

146. Time to first day of next term of court, to file bill of exceptions: must file on that day, or have further time given. *Meadows* v. *Campbell*, 1 Bush, 104.

147. If the plaintiff fails to prove a cause of action, the court should instruct as in case of a non-suit. *Shay* v. *Richmond and Lancaster Turnpike Co.*, 1 Bush, 108.

148. Property exempt from execution may remain in possession of vendor without being *per se* fraudulent. *Anthony & Co.* v. *Wade*, 1 Bush, 110.

149. Money advanced without any, or upon a fraudulent, consideration, may be recovered back. *Woodward* v. *Fels*, 1 Bush, 162.

150. It is no excuse for the defendant that his statements were made in answer to questions or as a witness, if knowingly false, and intended to cause the arrest and imprisonment of plaintiff. *Huggins* v. *Toler*, 1 Bush, 192.

151. Variance between the name of one of the plaintiffs and that of the note must be taken advantage of by answer. *Anderson* v. *Rogers & Clark*, 1 Bush, 200.

152. Defective appeal bond may be supplied by executing a new one. *Watters* v. *Patrick*, 1 Bush, 223.

153. *Prima facie* presumption of the acceptance of a deed from acknowledgment and registration, is repelled by denial of defendant that he had accepted, and by plaintiff's failure to answer defendant's cross-petition; and an offset being pleaded, it was error to order a sale till that issue was decided. *Skillman* v. *Hamilton, &c.*, 1 Bush, 248.

154. No right of action exists for non-payment of taxes until an assessment is made according to law. *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 1 Bush, 250.

155. Demand and refusal must be averred before an action can be maintained against an attorney for failing to pay over money collected by him. *Roberts* v. *Armstrong's adm'r*, 1 Bush, 263.

156. Where parties are multitudinous, an order should be made permitting a portion to stand for all. *Hendrix, &c.* v. *Money, &c.*, 1 Bush, 306.

157. The jury found for two of the defendants, and against the one served with process in another county. Court should

have dismissed the action as to him. *Ward* v. *George*, 1 Bush, 357.

158. Devisees not parties to a bill to set aside a will, have the right by petition to be made parties thereto. *Berry, &c.* v. *Hamilton*, 1 Bush, 361.

159. Where money is paid through mistake of fact or law, it may be recovered back. *City of Louisville* v. *Henning & Speed*, 1 Bush, 381.

160. A defendant constructively summoned, appeals; thereby enters his appearance in the court below upon the filing of the mandate, and no judgment can be rendered at that term against him. *Beazley* v. *Maret, &c.*, 1 Bush, 466.

161. In an action in equity, the court may determine the value of property wrongfully attached and converted. *Greer* v. *Powell, &c.*, 1 Bush, 489. A suit may be revived by appropriate means, otherwise than by order of court. *Same*, 489.

162. Failure to enter credits, admitted by plaintiff's petition, a clerical misprision. *Hieronymous, &c.* v. *Mayhall, &c.*, 1 Bush, 508.

PRACTICE IN CRIMINAL CASES, IN CIRCUIT COURTS.

1. See CRIMINAL LAW AND PROCEEDINGS.

2. The only question arising on a motion in arrest of judgment, in a criminal or penal case, is whether the facts stated in the indictment constitute a public offense, within the jurisdiction of the court; and error in overruling a demurrer to an indictment for permitting gaming, is not an error for which the court of appeals will reverse. (Criminal Code, secs. 271, 349; 18 B. Mon., 485.) *McDaniel* v. *Commonwealth*, 6 Bush, 326.

3. It is not improper for the court to give explanatory or additional instructions, after the argument has commenced. *Same*, 326.

4. The discharge of a juror, against the objection of the prisoner, after the jury was sworn, operated as a discharge of the entire jury; but it did not operate as an acquittal, or bar another trial. *O'Brian* v. *Commonwealth*, 6 Bush, 563.

5. On the trial of the accused in the circuit court, it was competent to prove the statements on the examining trial of a witness who had since died. *Same*, 563.

6. An arrest may be made on Sunday. A trial may proceed and the accused may be discharged or committed or bailed, on Sunday. *Watts, &c.* v. *Commonwealth*, 5 Bush, 309.

7. Keeping a tippling house, sufficient charge in an indictment. *Commonwealth* v. *Campbell*, 5 Bush, 311.

8. An indictment for robbery is sufficient, if laid in the words of the statute under which it is found. *Commonwealth* v. *Tanner*, 5 Bush, 316.

9. When the State makes out an unlawful homicide, and identifies the accused as the perpetrator, it has shown all that is essential to a conviction. *Kriel* v. *Commonwealth*, 5 Bush, 362.

10. Sanity is always presumed by law; and a mere doubt of sanity is insufficient to rebut this presumption. Mental or moral insanity, however recent, to such an extent as to destroy free agency and moral responsibility, on being established by satisfactory evidence, will excuse the prisoner. *Same*, 362.

11. Drunkenness may be of such a character and to such a degree, as to show that the mind is incapable of preconceived malice, and may reduce the homicide to manslaughter. *Same*, 362. But see *Shannon* v. *Commonwealth*, 8 Bush, 463.

12. If a house is broken into and entered feloniously, with the intention of stealing, without showing that anything was stolen, is sufficient to make out the offense of burglary. *Olive* v. *Commonwealth*, 5 Bush, 376. Sec. 127, Crim. Code, removes objection of misnomer of Christian name.

13. Indictment for keeping a tippling-house in Louisville. Keeper had State license, but not city license. To recover a fine, it was necessary to show an ordinance requiring a license in addition to the State license. *Lucker* v. *Commonwealth*, 4 Bush, 440.

14. Betting on any game of chance is now a statutory offense. *Commonwealth* v. *Branham*, 3 Bush, 1.

15. What is proved by an absent witness before the examining court, cannot be proved on another trial, without it is impossible to procure the attendance of the absentee. *Dye* v. *Commonwealth*, 3 Bush, 3.

16. Where grand jury fails to indict a party who is bailed, the court should discharge him, unless the court is of opinion that the charge should be submitted to another grand jury; and the sureties will not be liable on the bail bond, although no order discharging accused be made. (3 Bush, 12.) *Bryant, &c.* v. *Commonwealth*, 3 Bush, 9.

17. A single justice, for a misdemeanor, can hold to bail and take a bail bond. *Rice, &c.* v. *Commonwealth*, 3 Bush, 14.

18. Dismission of an indictment, with presumed consent of the court, is no bar to another indictment. *Wilson* v. *Commonwealth*, 3 Bush, 105.

19. For being bribed to vote, accused should not be convicted on testimony of a single witness. *Russell* v. *Commonwealth*, 3 Bush, 469.

20. That a witness had been prosecuted for false swearing, and that all of defendant's witnesses belonged to a clique to swear negroes out of any offense charged against them, inadmissible. *Taylor* v. *Commonwealth*, 3 Bush, 508.

21. Defendants appear on a defective recognizance. It is the duty of the court to hold them in custody until they acknowledge a good one. *Commonwealth* v. *Reed, &c.*, 3 Bush, 516.

22. Evidence taken down at examining trial may be used to test the magistrate's memory, and to show his imperfect recollection of what was sworn to on the trial. *Lanham* v. *Commonwealth*, 3 Bush, 528.

23. Oral declarations of the court, which are virtual instructions, are illegal. *Coppage* v. *Commonwealth*, 3 Bush, 532.

24. Indictment charging an assault to rob is good. *Dickerson* v. *Commonwealth*, 2 Bush, 1.

25. An indictment for keeping a billiard table must allege that it was kept for hire or profit. *Holt* v. *Commonwealth*, 2 Bush, 33.

26. In determining the question of malice and mitigation, the defendant's condition of drunkenness at the time should be considered by the jury. *Curry* v. *Commonwealth*, 2 Bush, 67. But see Shannon v. Commonwealth, 8 Bush, 463.

27. Failure to administer the oath to the officers having charge of the jury, required by sec. 242, Criminal Code, will

be a good ground for setting aside the verdict. *Commonwealth* v. *Shields*, 2 Bush, 81.

28. Violating a criminal law which has expired or been repealed before judgment, will not justify a conviction. *Commonwealth* v. *Palmer*, 2 Bush, 570. See now, General Statutes, art. 1, sec. 3, "An act to adopt the General Statutes," page 138.

29. Conviction for stealing *Stephen* Daniel's hog, upon proof that defendant stole *Philip* Daniel's hog, held erroneous. *Hensley* v. *Commonwealth*, 1 Bush, 11.

30. Money deposited in lieu of bail will be forfeited by failure of the defendant to appear and answer, as required by law. *Dean* v. *Commonwealth*, 1 Bush, 20.

31. One jointly indicted with another, is not a competent witness for the latter in a separate trial, unless the witness has been previously discharged. *Chandler* v. *Commonwealth*, 1 Bush, 41.

32. W. failed to appear, and forfeited his bail bond. Pending a motion for judgment on it, defendant appeared and surrendered himself; and moved the court to remit the recognizance, which was done. *Commonwealth* v. *Davidson*, 1 Bush, 133.

33. On conviction for continuing a nuisance, the court should order defendant to abate it by a given day; and upon failure, should order the sheriff to do so. *Ashbrook* v. *Commonwealth*, 1 Bush, 139.

34. By same act, with same intent, F. took a horse, wagon, and harness, property of H. Two indictments were found. On trial for stealing the horse, F. pleaded not guilty, and was acquitted. This was a good plea in bar against the other indictment. *Fisher* v. *Commonwealth*, 1 Bush, 211.

PRACTICE IN THE COURT OF APPEALS.

1. If one who is interested in the decision of a question refuse to join in an appeal, a cross-appeal must be dismissed for want of necessary parties. (Civil Code, sec. 895; Smith v. Northern Bank, 1 Metcalfe, 575.) *Gaar, &c.* v. *Louisville Banking Company*, 11 Bush (April 20, 1875, and Sept. 9, 1875).

2. Defect of parties plaintiff is a fact which can not be raised, for the first time, in the court of appeals. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

3. Court of appeals will reverse a void judgment. *Landrum* v. *Farmer*, 7 Bush, 46.

4. When case is reversed because improper evidence admitted, the court will point out errors in instructions, although not objected to when offered. *Edgerton* v. *Commonwealth*, 7 Bush, 142.

5. This court will not disturb a verdict, where the evidence was conflicting. *L., C. & L. R. R. Co.* v. *Mahony's adm'x*, 7 Bush, 235.

6. Court cannot correct judgments of a former term, unless there be something in the record to amend by, where there was no appeal in the court below, service of summons, nor constructive service, although judgment is void and court will so regard it; but the appeal in this court will be regarded as still pending. *Finnell, &c.* v. *Jones' ex'x, &c.*, 7 Bush, 359.

7. A *supersedeas* must issue to suspend judgment, but no record is necessary to be made of it. And the certificate of the clerk that he had no official knowledge of its issuing, does not rebut the presumption that the clerk did his duty where an appeal was granted and bond executed. *Whitehead* v. *Boorom*, 7 Bush, 399.

8. Mandate of the court of appeals will be enforced by rule against the judge of a lower court. *Smith* v. *Cochran*, 7 Bush, 548.

9. When all the evidence is not contained in the bill of exceptions, the court will presume that it was sufficient to justify the verdict. *Reed* v. *Commonwealth*, 7 Bush, 641.

10. Appeal prosecuted in the name of a dead party: Reversal in such a case can not be treated as void by the court below. *Spalding, adm'r, &c.* v. *Wathen*, 7 Bush, 659.

11. Allowance or rejection of amended pleadings is not usually a cause of reversal. *Downing* v. *Bacon, &c.*, 7 Bush, 680.

PRESUMPTION.

1. See EVIDENCE.

2. The legal presumption, where a bond bears no other date than "the — day of ——, 1869," is that it did not become bind-

ing on the bondsmen until the last day of that year. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

3. The law raises an implied obligation on the part of a party who obtains money without right, to refund it to the party entitled to it. *Garrott* v. *Jaffray & Co.*, 10 Bush, 413.

4. An implied contract is created by legal presumption upon a given state of facts. *Garrott* v. *Jaffray & Co.*, 10 Bush, 413.

5. If a deed is not actually delivered to the grantee or his agent, it is essential to prove notice to him of its execution, and such additional circumstances as will afford a reasonable presumption of his acceptance of it. Acceptance of a deed will not be presumed merely because beneficial. (28 Texas, 773.) *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

6. Where an act is susceptible of two constructions, one lawful, the other not, that which is lawful should be preferred. *Kenton Co. Court* v. *Bank Lick Turnpike Co.*, 10 Bush, 529.

7. A tax is not presumed to be legally imposed, where the action of the officers imposing it is called directly in question by the tax-payers. *Bate, &c.* v. *Speed, &c.*, 10 Bush, 644.

8. The surrender of a note raises a presumption of payment. *Well's adm'r* v. *Robb*, 9 Bush, 26.

9. The sheriff's returns not showing that the person served with orders of attachment was the occupant of the land, or any inference that he was not—the presumption must be indulged, that the officer made the levies in the mode pointed out by law, and that the person served was the occupant of the premises. *Thomas* v. *Mahone*, 9 Bush, 111.

10. A defendant charged with disorderly conduct was required to give bond "to keep the peace, etc." In a proceeding on the bond, *Held*—that as the record does not show the evidence on the trial of that charge, it must be presumed that it was such as to authorize the requiring of the bond. *Rankin and Zahn* v. *Commonwealth*, 9 Bush, 553.

PRESUMPTION OF DEATH.

After absence for seven years from the State, death will be presumed, unless proved to be alive within that time. *Foulks* v. *Rhea*, 7 Bush, 568.

PRINCIPAL AND AGENT.

1. See page 23, AGENT.

2. Employers are liable for the felonious or fraudulent acts of their agents, when the latter act within the scope of their employment, and the misconduct connects itself with the service being performed for the employer. (Sherley v. Billings, 8 Bush, 147; 8 Queen's Bench R., 244; 2 Exchequer R., 259; 8 Common Law R., 563.) *Ray's adm'rs* v. *Bank of Kentucky*, 10 Bush, 344.

3. The acts of an agent, within the scope of his agency, bind his principal—although the agent may disregard private instructions not communicated to the person with whom he deals, and may not disclose the agency. *Bell* v. *Offutt*, 10 Bush, 632.

4. One engaged in a certain trade, employed by another to do acts in that trade, is a general agent. *Ibid.*

5. If a letter to a live-stock broker, directing the purchase of hogs (naming number, and price), was his only authority, it constituted him a special agent bound by the letter. *Bell* v. *Offutt*, 10 Bush, 632.

6. One dealing with agent, whose powers he knows are limited, deals at his peril, whether the limitation be as to power or mode of execution. *Craycraft, &c.* v. *Selvage, &c.*, 10 Bush, 696.

PROCESS.

1. Process on an amended pleading should be served, where it presents a new cause of action distinct from the original, and of which defendant could not be apprised by inspection of the original petition. (Rutledge v. Vanmeter, 8 Bush, 354; McGrath v. Balser, 6 B. Mon., 141.) *Joyes* v. *Hamilton*, 10 Bush, 544.

2. Where a new and distinct cause of action is set out in an amended petition, summons must issue. *Cecil* v. *Sowards, &c.*, 10 Bush, 96.

3. A suit under the act of March 10, 1856, is not instituted unless summons is sued out on the petition within the prescribed six months. *Cecil* v. *Sowards, &c.*, 10 Bush, 96.

4. Service of a summons on the party who prosecutes an appeal, without appearance in the lower court, will not be necessary on the return of the case to the court below. *Cavin & Elliott* v. *Williams & Ray*, 8 Bush, 343.

5. Amended petition filed, setting up new cause of action, unconnected with that in the original petition, should not be treated as confessed by failure to answer, the defendants having been summoned only to answer the original petition. *Rutledge* v. *Vanmeter*, 8 Bush, 354.

6. In all proceedings upon constructive service, the provisions of the Code must be literally followed. *Brownfield, &c.* v. *Dyer, &c.*, 7 Bush, 505.

7. Neither defendant being served in the county where the action was brought, judgment by default was error. *Dyas* v. *Lindsey*, 5 Bush, 587.

8. Summons directed to the sheriff may be executed by a constable. *Long* v. *Gaines, Berry & Co.*, 4 Bush, 353. Being executed on John Long, the court cannot presume that there were other John Longs in the county than the defendant. *Same*, 353.

9. Summons is returnable to the next term of the court, unless that term begins within ten days from the date of the summons. *Peters, gd'n, &c.* v. *Conway*, 4 Bush, 565. The return day of an order of arrest, issued at the commencement of the action, same as that of the summons; and where the summons is signed by the clerk, and has an unattested indorsement on the back, the words of the summons must prevail. *Same*, 565.

10. A writ of *habeas corpus*, or process on a charge of treason, felony, or riot, or breach of the peace, or upon an escape out of custody, may be executed on Sunday. *Rice, &c.* v. *Commonwealth*, 3 Bush, 14.

11. A summons for setting up a real estate agency in the city of Louisville without license, did not authorize the arrest of defendant. *Wallenweber* v. *Commonwealth*, 3 Bush, 68.

12. Process not necessary on a cross-petition against plaintiff. *Peak, &c.* v. *Percifull, &c.*, 3 Bush, 218.

13. If plaintiff permits the time constituting a bar to elapse, between the time of suing out one process until another, will

not prevent the limitation from running *Clark* v. *Kellar*, 3 Bush, 223.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND NOTES.

PROTEST.

See NOTARY PUBLIC; and BILLS OF EXCHANGE AND NOTES.

PUBLIC LIBRARY OF KENTUCKY.

The Public Library of Kentucky Company had the right to sell tickets of admission to their concert, and to distribute prizes among the ticket-holders. The facts connected with this sale and distribution are not set out in the record, and without these facts the court cannot determine judicially as to the character of these transactions. In the absence of proof to the contrary, for the purposes of this litigation, we must assume that it acted within the scope of the powers granted by its act of incorporation. *Bibb, &c.* v. *Miller, &c.*, 11 Bush (Sept. 21, 1875).

PUBLIC POLICY.

1. Agreement, in a mortgage or note, to pay attorney's fee in case suit is brought upon the same, is against public policy and *quasi*-usurious, and will not be enforced if resisted. *Thomasson* v. *Townsend*, 10 Bush, 114.

2. Waiver of benefits under exemption laws is against public policy, and can not be enforced. The recitals in such agreements can not constitute an estoppel. (10 Howard, N. Y., 283; 31 Barb., 170.) *Moxley* v. *Ragan, &c.*, 10 Bush, 156.

PURCHASER.

1. See VENDOR AND VENDEE; and CONTRACTS.

2. He who executes an obligation as joint purchaser with a married woman, and gives his sureties, is presumed to know

that the married woman can make no such contract; and having made themselves voluntarily liable, they are held for the purchase, even though she abandon the contract and have it canceled by the chancellor. *M. P. Robinson, &c.* v. *B. F. Robinson's trustee, &c.*, 11 Bush (April 20, 1875).

3. The taking of an estate, after notice of a prior right, makes one a *mala fide* purchaser. Yet an innocent purchaser from a vendor who is a *mala fide* purchaser, can not be said to be guilty of fraud. *Hardin's ex'r, &c.* v. *Herrington, &c.*, 11 Bush (Oct. 2, 1875).

4. He who has the prior equity in point of time, has the prior right. A party resisting the equity, in order to maintain his defense must protect himself under an elder equity; or else he must have purchased the legal title *bona fide*, without notice, for a valuable consideration; and not only so, he must have paid the purchase-money. (2 Story's Eq., 829, 11th ed.) *Ibid.*

5. In a contest for land between innocent purchasers, on the one hand, who are in possession and with the legal title, and, on the other hand, infants holding only an equity—because their ancestor had neglected to put his title bond upon record, or to secure a deed after paying all the purchase-money—courts of equity allow a superior strength to the legal title, where the rights of the parties are in conscience equal. The former claim is sustained. But it appearing that one innocent purchaser is yet owing the last payment on the land, bought of a deceased vendor who had notice of the infants' title: *Held*—that to this extent he must be regarded as a purchaser with notice, and as holding the unpaid fund in trust for the infants, to the extent of their right to indemnity. (Story's Eq., 9th ed., sec. 1902; Picket v. Baum and wife, 29 Washington, 505.) *Hardin's ex'r, &c.* v. *Herrington, &c.*, 11 Bush (Oct. 2, 1875).

6. One who claims the benefit of a *lis pendens* against a *bona fide* purchaser, must show that the suit was prosecuted with diligence. (Erhman v. Kendrick, 1 Met., 149; Watson v. Wilson, 2 Dana, 406; Clarkson v. Morgan, 6 B. Mon., 447.) *Hawes, &c.* v. *Orr, &c.*, 10 Bush, 431.

7. So far as the pendency of the suit can affect others than parties to the action, matter brought into it by amended plead-

ing will not relate back to the time of filing of the original. *Hawes, &c.* v. *Orr, &c.*, 10 Bush, 431.

8. One purchasing property when it is the subject of litigation, takes it subject to the judgment that may be rendered in the case. *Hawes, &c.* v. *Orr, &c.*, 10 Bush, 431.

9. Execution may be levied on land, pending a suit for its partition; but a purchaser at the sale must accept such interest as is allotted to him whose share he purchased. *Hawes, &c.* v. *Orr, &c.*, 10 Bush, 431.

RAILROADS.

1. See, also, CORPORATIONS; CARRIERS (9 Bush, 688); and DAMAGES (9 Bush, 728).

2. An act, requiring a county court to subscribe for stock in a railroad company in behalf of a precinct through which the railroad passes—the preamble of which recited that it was passed upon petition of a majority of the tax-payers and voters of the precinct—is constitutional. *Allison, &c.* v. *Louisville, Harrod's Creek and Westport R. R. Co.*, 10 Bush, 1.

3. Preamble of an act is *prima facie* evidence of fact therein set forth. *Allison, &c.* v. *Louisville, Harrod's Creek and Westport R. R. Co.*, 10 Bush, 1.

4. Taxes to pay county's subscription in aid of a railroad are public dues, within the meaning of sec. 3, art. 2, chap. 26, of the Revised Statutes. *Anderson, &c.* v. *Thompson, &c.*, 10 Bush, 132.

5. All kinds of railroads are liable for injuries to persons from the negligence of employees. *Johnson's adm'r* v. *Louisville City Railway Co.*, 10 Bush, 231.

6. A railroad embankment, erected with the consent of the city, in the middle of a street, but leaving room on both sides for vehicles meeting to pass, was not such an appropriation of the street as gave the adjacent land-owners a cause of action against the railroad company. *Cosby, &c.* v. *Owensboro and Russellville R. R. Co.*, 10 Bush, 288.

7. If a street is so appropriated, even by municipal sanction, as to abridge the right of adjacent land-owners to its use for

ingress and egress, an action will lie against the person or corporation so appropriating the street. *Elizabethtown, Lexington and Big Sandy R. R. Co.* v. *Combs*, 10 Bush, 382.

8. Where a railroad through a street so obstructs it as to deprive the owners of adjacent land of the means of ingress and egress, with ordinary vehicles, on either side of the road when the cars are standing thereon, they may recover damages from the railroad company. *Ibid.*

9. Damage from smoke, soot or fire from locomotives thrown or blown into or against adjacent houses, in such case, will entitle the owner to recover therefor. *Ibid.*

10. The measure of damages in such cases will be the diminution of value of the property occasioned by these circumstances, and not the difference between the value of the property before and after the building of the road. *Ibid.*

11. In actions for injury to real property by trespassers, only a single recovery may be had, where the injury is permanent and continuing. *Ibid.*

12. Actions against the Louisville and Nashville R. R. Co. for killing or injuring stock must be brought within six months. *Mortimer* v. *L. & L. R. R. Co.*, 10 Bush, 485.

13. The act of March 17, 1871, does not take from or suspend the right of the owner of stock injured by the railway company to sue for damages immediately after the injury is done; nor does it repeal former statutes on the subject, or affect the limitation of such actions. If the owner follows the statute, he, by his own act, diminishes the time within which the action must be brought, and must abide the legal consequences. *Mortimer* v. *Louisville and Nashville R. R. Co.*, 10 Bush, 485.

14. General authority to a railroad corporation to condemn a site for its roadway will not authorize the condemnation of a highway running longitudinally therewith. (4 Cushing, 63.) In the absence of testimony tending to show a necessity for such appropriation, an abandonment by the road corporation to the railroad will be presumed voluntary and without the assent of the State. *Kenton County Court* v. *Bank Lick Turnpike Co.*, 10 Bush, 529.

15. The act of April 9, 1873, "for the protection of counties, cities, etc., subscribing stock in railroads, etc.," was not intended

as an amendment to any charter, but as a general law, and does not apply to subscriptions fully consummated before its passage. (22 Howard, 364.) *Cumberland and Ohio R. R. Co.* v. *Judge of Washington County Court*, 10 Bush, 564.

16. Where there is danger of a misapplication of funds subscribed, a court of equity, and it seems a court of law, should refuse to enforce a subscription until the corporation properly secures the appropriation in accordance with the terms of subscription. *Ibid.*

17. Subscription of stock in a railroad company by a majority vote of the county is executory, until the subscription is actually made. *Cumberland and Ohio R. R. Co.* v. *Barren County Court*, 10 Bush, 604.

18. The charter of a railroad company provides that when it shall request a subscription to its stock from a county, "the county court so requested may *in their discretion* order an election," etc. *Held*—the county judge could not order the election without having associated with him a majority of the justices of the county. *Bowling Green and Madisonville R. R. Co.* v. *Warren County Court*, 10 Bush, 711.

19. A city has a right to charge a *bonus*, for the use of its streets by a street-railway company. *Covington Street-Railway Co.* v. *City of Covington*, 9 Bush, 127.

20. A city has no right to authorize the construction of street-railways without some legislative enactment vesting the municipal authorities with such power. *Ibid.*

21. The stock subscribed by a county or precinct to a railroad company should not be included in the number of shares of stock necessary to be subscribed to authorize the company to organize and elect directors; and until it was organized, the question could not be submitted to the voters of any precinct whether the county court should subscribe for stock. *Allison, &c.* v. *Louisville, Harrod's Creek and Westport Railway Co.*, 9 Bush, 247.

22. Any tax-payer of a precinct has the right, by legal proceedings, to restrain the sale of the bonds of the precinct illegally issued to aid in the construction of a railway. *Ibid.*

23. A curative act of the legislature, after suit was instituted, could not affect the rights of the parties to the suit, or the law as it existed at the time the petition was filed. *Ibid.*

24. The judicial being a co-ordinate and independent department of the State government, neither of the other departments can constitutionally interfere with it in the exercise of its exclusive right to determine the law of existing cases. *Ibid.*

25. The Evansville, Henderson and Nashville Railroad is subject to taxation at the rate of $20,000 per mile by act of Feb. 20, 1864. *Evansville, Henderson and Nashville Railroad* v. *Commonwealth*, 9 Bush, 438.

26. A director of a railroad company purchased the railroad belonging to his corporation, at a judicial sale thereof, without consent of the corporation, and without permission of the chancellor: *Held*—that the corporation has a right to have its road surrendered, upon placing the director who purchased it in *statu quo*. Being a fiduciary, the director could not purchase the property of the corporation, even at a judicial sale, without its consent, or without the permission of the chancellor by whom the sale was decreed. *Covington and Lexington Railroad Company* v. *Bowler's heirs, &c.*, 9 Bush, 468.

27. The right of railroad companies to ask from local communities assistance, by taxation, will not be enlarged by construction. *Tyler's ex'r* v. *Elizabethtown & Paducah R. R. Co.*, 9 Bush, 510.

28. The right of the Elizabethtown and Paducah Railroad Company to build branch roads is as full and complete as the right to construct the main road itself. *Ibid.*

29. A second subscription of stock in said road by the city of Louisville is valid. *Ibid.*

30. It will not be presumed that the provisions of the charter were disregarded when it is not alleged in the pleadings and does not appear in the record. *Ibid.*

31. The company may connect with Louisville by a branch road, though the right to extend the main road was granted. *Ibid.*

32. General legislation does not usually apply to or control specific acts. *Ibid.*

33. The charter of a private corporation is not repealed or modified by a general act relating to an entirely different subject. *Ibid.*

34. The Elizabethtown and Paducah Railroad Company is not restricted to one proposition to subscribe, nor is the city of Louisville restricted to one subscription of stock in said company. *Tyler's ex'r* v. *Elizabethtown & Paducah R. R. Co.*, 9 Bush, 510.

35. A railroad company is held liable for injuries to one employee resulting from the negligence of another. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Caven's adm'r*, 9 Bush, 559.

36. A railroad company, transporting live-stock, is not an insurer for all loss not caused by acts of God or public enemies; but must exercise a high degree of diligence, and is liable for ordinary negligence. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Hedger*, 9 Bush, 645.

37. The loss or injury of live-stock so transported, while in the custody and care of the company, is *prima facie* evidence of negligence; but if the owner of the stock loads and unloads them, the burden of proof is upon him to show negligence. *Ibid.*

38. A carrier can not, by contract, relieve himself from liability for negligence of himself or agents, whether ordinary or otherwise. *Ibid.*

39. The act of Feb. 8, 1870, authorizing the Louisville and Frankfort Railroad Company to contract specially for the transportation of live-stock, conferred no greater right in this regard than the company already had. *Ibid.*

40. A railroad company not liable for unclaimed baggage which was destroyed by the burning of the depot, unless the fire was occasioned by the negligence of the employees of the company. *Lou., Cin. & Lex. R. R. Co.* v. *Mahan*, 8 Bush, 184.

41. The company is liable as common carriers for the baggage of passengers, until the baggage is ready to be delivered to the owner at his place of destination, and until he has had a reasonable opportunity of receiving and removing it. (2 Bush, 473; Redfield on Railways, sec. 171, subsec. 3.) *Same*, 184.

42. Paper filed with the petition, and made part of it, is a part of the case, and the jury had the right to regard the statements of fact therein as admissions upon the part of the plaintiff. *Same*, 184.

43. A subscription of stock without legislative authority, as a general rule may be rendered valid by an act of the legislature confirming it. (Pierce on American R. R. Law, 124; 15 Conn., 475.) *Shelby Co. Court* v. *Cum. & Ohio R. R. Co.*, 8 Bush, 209. The law authorizing the subscription must be complied with, and if not followed, the bonds issued thereunder will be void, unless the defect is cured by subsequent legislation. (3 Met., 140.) The correctness of the judgment of the county court that the conditions of the propositions to be voted for had been complied with, cannot be questioned collaterally in a proceeding against the county court by *mandamus* to issue the bonds. *Same*, 209.

44. At common law, railroad companies are not liable for injuries committed by trains upon stock straying upon the road, unless the injuries were the result of the willful and reckless negligence on the part of the company or its employees. (2 Met., 183.) *O'Bannon* v. *Lou., Cin. & Lex. R. R. Co.*, 8 Bush, 348.

45. A railroad company is liable for damages resulting from a failure to keep a culvert unobstructed. *West & Bro.* v. *L., C. & L. R. R. Co.*, 8 Bush, 404.

46. A railroad company is responsible for a gold watch which was lost from the trunk of a passenger by the negligence of the company. *American Contract Co.* v. *Cross*, 8 Bush, 472.

47. Damages for land taken by railroad should be ascertained as follows: [See title AD QUOD DAMNUM.] *Elizabethtown & Paducah R. R. Co.* v. *Helm's heirs*, 8 Bush, 681.

48. Taxes voluntarily paid towards building a railroad can not be recovered back. *Moore* v. *Bath Co. Court*, 7 Bush, 177.

49. Whether the facts sustain the charge of willful neglect left to the jury. *L., C. & L. R. R. Co.* v. *Mahoney's adm'x*, 7 Bush, 235. Proof of ages and number of children in such case admissible. Probable period of natural life of deceased admissible; and the pecuniary ability of defendant, also. Although the deceased may have acted negligently, and might have effected his escape by ordinary diligence, yet if the disaster resulted from the willful neglect of the company's agents in operating the train, the company will be liable. (17 B. Mon., 586; 5

Bush, 1; 2 Duvall, 114; 4 Bush, 507; 6 Bush, 574.) *L., C. & L. R. R. Co.* v. *Mahoney's adm'x*, 7 Bush, 235.

50. March 22, 1871, an act was approved declaring the capital stock in all railroad companies incorporated by the laws of this State personal property. Prior thereto, held to be real estate. *Copeland* v. *Copeland*, 7 Bush, 349.

51. That the charter has been strictly pursued, can only be shown by the record itself (if in existence), in condemning land for railroad. *Penny, &c.* v. *Pindell, &c.*, 7 Bush, 571.

52. For obstructing natural flow of water by an embankment and causing an occasional inundation of plaintiff's lot, he may maintain trespass, and recover damages therefor. *Louisville & Nashville R. R Co.* v. *Hodge, &c.*, 6 Bush, 141.

53. Owner of land is not deprived of his right to compensation, by permitting the railroad company to enter, upon the promise that the owner should thereafter be paid. *Evansville, Henderson & Nashville R. R. Co.* v. *Grady*, 6 Bush, 144.

54. The implied undertaking of employees in the same service, to risk the contingencies which the ordinary skill and care of each in his line of service could not avert, does not exonerate a railroad company from liability for damages resulting to one of such co-agents from the extraordinary or gross negligence of another of them; but the neglect must involve an intentional wrong, or such a reckless disregard of society and right, as to imply bad faith. *L. & N. R. R. Co.* v. *Filbern's adm'x*, 6 Bush, 574. The maxim, *respondeat superior*, does not apply in this case. *Same*, 574. (4 Bush, 507.)

55. The voluntary situation of the passenger's arm in the window of the car, at the time of the injury, must in law be deemed gross negligence, which contributed to the injury to his arm, and precludes him from a right of recovery unless he shows gross negligence on the part of the company or its agents or employees; or that the injury was intentionally done, or could have been avoided by ordinary care. *L. & N. R. R. Co.* v. *Sickings*, 5 Bush, 1.

56. The legislature may create a district to be assessed to construct railroads, without reference to existing civil or political districts. *Judge of Shelby Co. Court* v. *Shelby R. R. Co.*, 5 Bush, 225.

57. For injuries sustained by a passenger, there being no proof of gross negligence or wanton recklessness, the assessment ought to be compensatory, and not for smart money *Ky. C. R. R. Co.* v. *Dills*, 4 Bush, 593.

58. If the injury resulted from the negligence or temerity of the plaintiff, he can recover nothing. If it was a compound of negligence on both sides, he can recover nothing, unless the managing agents saw his perilous condition, and might by ordinary diligence have prevented the injury. *Same*, 593.

59. A mule jumped on the track, about fifty yards ahead of the locomotive, and was killed by an inevitable collision—there being no proof of negligence, unskillfulness, defective machinery, or recklessness. Could the train have been stopped before it reached the mule, or its progress retarded until the mule could have been out of danger, it was the duty of the engineer to do so. *L. & N. R. R. Co.* v. *Wainscott*, 3 Bush, 149.

60. A railroad and all its appurtenances, the law treats as an entire thing. It is not a fit subject for local taxation by separate counties through which it passes, and cannot be made liable to be taxed by a county to pay the subscription of such county for the purpose of completing the construction of the road. *Applegate, &c.* v. *Ernst, &c.*, 3 Bush, 648.

61. Depots are the places of delivery for railroads, and the liability of the company continues until the goods are ready to be delivered at their place of destination, and the owner or consignee has had reasonable opportunity of receiving and removing them. What is a reasonable opportunity, will depend on the circumstances of each case, whether the freight arrived out of time or not. *Jeffersonville R. R. Co.* v. *Cleveland*, 2 Bush, 468.

62. The L. & N. R. R. Co. was subject to taxation according to its corporate estate, until the act of Feb. 20, 1864, was passed. (Myers' Sup., 480.) *L. & N. R. R. Co.* v. *Commonwealth*, 1 Bush, 250.

63. A railroad company must pay the value of a person's land taken for its use, without regard to consequential advantages resulting to the owner from the construction of the road. Consequential charges are to be set off against consequential advan-

tages to the owner. Cost of fencing is a consequential damage. *L. & N. R. R. Co.* v. *Glazebrook*, 1 Bush, 325.

64. A railroad company liable for slaves escaping thereby. But if the slave returned, the owner is entitled to recover for the loss of time. *L. & N. R. R. Co.* v. *Young*, 1 Bush, 401.

65. The expression that the goods were shipped in good order, contained in bills of lading, means their apparent condition; and applies to their internal condition only so far as might be inferred from appearances. *Keith, &c.* v. *Amende*, 1 Bush, 455.

REASONABLE DOUBT.

See CRIMINAL LAW AND PROCEEDINGS (9 Bush, 593).

RECEIPT.

See EVIDENCE.

RECEIVER.

A receiver is appointed for the benefit of all parties who may establish rights in the cause; and the money in his hands is in the custody of the court, to be distributed to those who make out title to it, in equitable priority. *Douglas, &c.* v. *Cline, &c.*, 11 Bush (Nov. 2, 1875).

RECITALS.

See EVIDENCE.

RECOGNIZANCE.

See BAIL; and BONDS, STATUTORY.

REDEMPTION, EQUITY OF.

See EXECUTIONS; LIEN; and PURCHASER.

REFUNDING BONDS.

Refunding bonds cannot be required of devisees, by an executor, after suits against him by creditors have been barred by lapse of time. *Grigsby's ex'r* v. *Wilkinson, &c.*, 9 Bush, 91.

RELEASE.

1. See BILLS OF EXCHANGE AND NOTES.

2. When execution issues on an appeal bond, a resulting lien on defendant's property inures to the surety in the bond, by subrogation; and if discharged by plaintiff, will release the surety. *Dills* v. *Cecil*, 4 Bush, 579.

REMAINDER AND REVERSION.

See DEVISES AND DEVISEES; LIMITATIONS; RENTS AND IMPROVEMENTS; and LIFE ESTATES AND REMAINDERS.

REMEDIAL STATUTES.

A statute merely remedial may be applied to actions existing at the time it became a law, without affecting vested rights. (4 How., 145; 1 Barb., 648; 6 Seld., 374; Cooley's Constitutional Limitations, 288.) *Broaddus' devisees* v. *Broaddus' heirs*, 10 Bush, 299.

REMOVAL OF SUITS FROM STATE COURTS TO UNITED STATES COURTS.

1. Motions to remove suits from State courts to the United States circuit court, must be made before "final trial or hearing" in the State court. *Hall & Long* v. *Ricketts*, 9 Bush, 366.

2. A trial resulting in a verdict is a final trial. *Ibid.*

3. See TRANSFER FROM STATE COURT TO U. S. DISTRICT COURT.

RENTS.

See LANDLORD AND TENANT.

RENTS AND IMPROVEMENTS.

1. Rents accruing after death of decedent, are not assets in the administrator's hands. *Rank* v. *Hill's adm'r*, 8 Bush, 66.

2. Claimants of real estate may be barred by the warranty of ancestor. *Proctor, &c.* v. *Smith, &c.*, 8 Bush, 81. The rights of vendees, how adjusted in case of recovery against them. *Same*, 81.

3. Occupant's claims for improvements are to be ascertained and allowed according to sec. 1, art. 7, chap. 76, Rev. Stat., 2 Stanton, 185. (Thomas v. Thomas' ex'r, 16 B. Mon., 420.) *Same*, 81. Improvements should be measured by the increase of the vendible value they give to the land. *Same*, 81.

4. A claim for lasting and valuable improvements, is an equitable defense, the trial of which should be transferred to the equity docket. (15 B. Mon., 70.) *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

5. Generally, to an innocent purchaser, the amount of the allowance depends on the actual enhancement of the value of the property. But the rule does not apply in this case. *Hall and wife* v. *Brummal, &c.*, 7 Bush, 43.

6. Tenant is bound to pay the rent, although the premises should be destroyed by inevitable casualty. *Helburn & Co.* v. *Mofford, &c.*, 7 Bush, 169.

7. Contract was rescinded because of fraudulent representation of boundary. The vendee was charged with rent, and the value of wood and timber sold from the land; and credited by the purchase-money paid, and interest thereon, and by ameliorations he put on the land. *Upshaw, &c.* v. *Debow*, 7 Bush, 442.

8. Rent carries interest, after it becomes due. *Moore* v. *Calvert*, 6 Bush, 356. But on the recovery of damages for detention of land after its recovery, interest is not allowed. *Same*, 356.

9. A parol purchaser is entitled to ameliorations put upon the land. *Glass* v. *Abbott*, 6 Bush, 622.

10. Assignee of a title bond is entitled to the rent due at the end of the year. *Epperson* v. *Blakemore*, 2 Bush, 241.

11. Purchaser of land under a judgment is entitled to the rent accruing thereafter, and may be collected by rule from the tenant. *Cooper* v. *Baker*, 2 Bush, 244.

12. If a sub-tenant is accepted by the landlord as his immediate tenant, the original tenant is released thereby from the rent that may thereafter accrue. *Stimmel & Bryant* v. *Waters*, 2 Bush, 282.

13. Husband cannot lease wife's land, held by a trustee or for her sole and separate use. But the trustee, or the wife with his consent alone, can lease it, and appropriate the proceeds. *Carter, &c.* v. *Carter*, 2 Bush, 288.

REPLEVIN BONDS.

1. The surety in a supersedeas bond is liable to the surety in the replevin bond. *Kellar* v. *Williams*, 10 Bush, 216.

2. Respite of a replevied fine does not release the surety in the bond. *Nall* v. *Springfield, &c.*, 9 Bush, 673.

3. A *capias pro fine* may be replevied. *Commonwealth* v. *Merrigan*, 8 Bush, 131.

4. Replevin bond may be revived by rule, or action prosecuted by ordinary proceedings under section 437, Civil Code. *Chinn's adm'r* v. *Harrodsburg Savings Institution*, 8 Bush, 290. After a levy, the sheriff has a right to take a replevin bond after the return day of the execution. *Same*, 290.

5. A replevin bond signed on Sunday, but delivered on another day, is binding. *Prather* v. *Harlan and Thompson's adm'r*, 6 Bush, 185.

6. It is not vitiated by not being attested by the officer, nor other mere faultiness or omission of duty by the officer. *Same*, 185.

7. Abiding by the bond from 1861 to 1865, is a waiver of any objection to it. *Same*, 185.

8. At the request of sureties the execution was stayed, upon their executing a writing to remain bound for the debts in as full and complete a manner as if the same had not been stayed in

any way—hereby consenting that the collection of the debt shall be delayed so long as Prather, the plaintiff, may desire. Dated in 1861; in 1865, another *fi. fa.* issued. The court decided that the delay did not release the sureties. *Same*, 185.

9. A surety in a judgment debt, who signs a bond replevying such judgment, being a principal in the replevin bond, is not released from liability by the failure of the plaintiff for the space of a year to issue execution. *Milliken* v. *Dinning*, 6 Bush, 646.

10. The act providing for the release of sureties, in bonds having the force of a judgment, applies only to beneficial creditors, who have a right to forbear or enforce the collection. *Barbee* v. *Pitman*, 3 Bush, 259.

11. Said act does not apply to judicial bonds—the collection of which by execution, rule, or attachment must be controlled alone by the court, as to the time and manner of enforcement. A surety on a bond for money loaned out by order of court is not released by a failure to issue execution thereon for more than a year after its maturity. *Rankin, &c.* v. *White, &c.*, 3 Bush, 545.

12. Replevin bonds signed and delivered to the sheriff without date, are valid. He should fill up the date to correspond with the date of delivery. (2 J. J. M., 252; 2 Littell, 162.) If he should date the bonds to a date before the delivery, execution cannot legally issue on such bonds until they are due, counting from the date of the delivery; and if executions should issue before the bonds are properly due, sales of land thereunder will pass no title to the plaintiffs who are purchasers thereunder. *Bettis, &c.* v. *Bailey, &c.*, 2 Bush, 608.

13. Execution issued on a replevin bond. The defendants therein, by their instance, induced the bank to discount a note and apply the proceeds to the satisfaction of the execution. The note was forged. The return of satisfaction on the execution was set aside, and another one awarded on the replevin bond. *Held*, right. *Offutt* v. *Bank of Kentucky*, 1 Bush, 166.

14. An execution, issued upon a replevin bond, was returned by the sheriff satisfied by sale of land, in 1861. The land was recovered from the purchaser, and subjected to the payment of defendant's debts. At the Nov. term, 1865, the return of the

sale of the land was set aside, and execution issued on the replevin bond. *Held*, that the sureties were released by lapse of time. *Newman, &c.* v. *Hazelrigg*, 1 Bush, 412.

RESCISSION.

1. See CONTRACTS; and VENDOR AND VENDEE.

2. If the agreement was executory, or the right to enter was not based upon a valuable consideration, and the grantee had made no expenditures and improvements by reason of it, the appellees would have the right to revoke the grant without incurring any liability. *Dillon* v. *Crook & Co., &c.*, 11 Bush (Sept. 24, 1875).

3. See *Crawley* v. *Vaughan, &c.*, 11 Bush (Nov. 5. 1875).

4. As appellants could not, under their purchase, take or hold the share of Mrs. F. [because the statute regulating the sale of the real estate of married women had not been strictly followed], they should not have been required to execute the bonds for the purchase price. *Bridgeford & Co.* v. *Beck, &c.*, 11 Bush, (Nov. 12, 1875).

5. Contracts for the conveyance of lands, not evidenced by any writing, must be rescinded, although each party cannot be put in his original condition. *Holtzclaw, &c.*, v. *Blackerby*, 9 Bush, 40.

6. Covenant to convey implies a perfect legal title. That the defendant had not and never did have a good or perfect title, and that his title was defective, was not sufficient to put appellee upon an exhibition of his title. *Davis* v. *Dycus*, 7 Bush, 4.

7. Defect of title will not alone authorize rescission, when the conveyance is executed and vendee is in possession; but if the contract be tainted with fraud, it vitiates the whole transaction. *Upshaw, &c.* v. *Debow*, 7 Bush, 442.

8. Vendor fraudulently represented the land as 386 acres, when there were only 304 acres, and caused a line to be run to include 182 acres which were not within his true boundary. Contract rescinded. Vendee to be charged with rents and timber, etc., taken from the land, and deterioration of soil; and credited by purchase-money and interest, and ameliorations made on the land. *Same*, 442.

9. Vendee is not bound to examine vendor's title papers. He has the right to rely on vendor's statements. (6 Marshall, 23.) *Same*, 442.

10. If there is a verbal contract of sale and vendee put into possession, vendor may avoid such contract, and compel a rescission upon equitable terms. *Richmond & Lexington Turnpike Co.* v. *Rogers*, 7 Bush, 532.

11. Action for damages for failure to convey. Specific execution sought by defendant's answer and counter-claim. The allegations of grounds for rescission in the reply, do not change plaintiff's attitude from that of a resistant of the counter-claim, to that of an actor in the suit for rescission—the petition not being amended, and the reply restricted to such denials or statements as constitute a defense only. *Spalding* v. *Alexander, &c.*, 6 Bush, 160.

12. The title, although not perfect according to the muniments filed, is assured by length of possession, and not menaced by the assertion of an adversary claim. *Same*, 160.

13. Executory sale, with covenant of warranty in the bond, is rescinded, because the deeds exhibited were not executed in the mode required by law for married women, and were not recorded within eight months from the date thereof. (1 Stan., 281.) *McGuire* v. *Bowman, &c.*, 6 Bush, 550.

14. A fraud by a married woman may vitiate a sale made by her, and authorize a rescission of the contract, if properly sought; and it may operate to estop her from avoiding a sale or conveyance of her property. *Curd* v. *Dodds, &c.*, 6 Bush, 681.

15. No rescission is asked for, but only an exhibition of a perfect title: the vendor should be compelled to exhibit his title, and give time for perfecting it. The vendee after proper time should elect to take the title, with warranty, or rescind the contract. *Russell* v. *Shively, &c.*, 3 Bush, 162.

16. B. and C. exchanged houses and lots, by executory contract, in Nov., 1862, and possession was mutually given before the time fixed by the contract. The house obtained from C. was burned up while occupied by B.'s family, but without their fault. Contract rescinded, because C. failed to establish such a title as B. was bound to accept. *Calhoon* v. *Belden*, 3 Bush, 674.

17. Sale of a slave by man and wife implied a warranty of a perfect title. The wife had but a life estate. Their representations, although made in good faith and in ignorance of their title, were constructively fraudulent; and if the slave had been tendered back in proper time, would have entitled party to a rescission. Vendee is entitled to restitution *pro tanto*, to the extent of the title he paid for, more than he got. *Cook* v. *Redman*, 2 Bush, 52.

18. Party took conveyance of agent to sell land in Muhlenburg county, which was in fact in McLean county, but was once in the former county. Vendee cannot rescind contract without an effort to prove the title, or without showing that a good title can not be made. *Casey, &c.* v. *Lucas*, 2 Bush, 55.

19. The defendant is not bound to elect to accept the deed or rescind the contract, before the plaintiff had either answered the cross-petition or attempted to procure a satisfactory title. *Skillman* v. *Hamilton, &c.*, 1 Bush, 248.

20. If, without fault or negligence of the purchaser, it turned out that one of the mules he had purchased was already dead, or could not be found at the place of acceptance, or that the vendee had been deceived as to the soundness of the mules, or some of them, by vendor's false representations or explanations of their condition, the purchaser had the right to decline to receive the mules and rescind the contract *in toto*, whether the vendor was guilty of fraud or not. (Parsons on Contracts, 451.) *Phelps, &c.* v. *Quinn*, 1 Bush, 375.

RES GESTÆ.

The cries or exclamations of bystanders and lookers-on, where a homicide was committed, do not constitute part of the *res gestæ*. *Bradshaw* v. *Commonwealth*, 10 Bush, 576.

RESPITE.

Respite of a replevied fine does not release the surety in the bond. *Nall* v. *Springfield, &c.*, 9 Bush, 673.

REVENUE AND TAXATION.

1. See SHERIFFS (9 Bush, 701).

2. A railroad, taxed in proportion to its stock, built an extensive branch without increasing its stock. *Held*—that the branch road was subject to taxation; and the act of Feb. 20, 1864, regulated the mode of assessment and taxation of the entire road. *Louisville, Cincinnati & Lexington R. R. Co.* v. *Commonwealth*, 10 Bush, 43.

3. The taxing power of the state is never presumed to be relinquished, unless the intention to relinquish is expressed in clear and unambiguous terms. (Bodley v. McAtee, 7 Bush, 667.) *Ibid.*

4. Imposition of taxes at the time a charter is granted, does not imply that no additional tax shall be imposed on the property owned at the time of the charter, or on that afterwards acquired. *Ibid.*

5. The legislature had the constitutional right to pass the act of Feb. 20, 1864, changing the mode of assessing and taxing the railroads in the State, and repealing all laws and charter provisions in conflict with it; unless it be in cases where the State had expressly relinquished the right of taxation, in consideration of some public benefit. *Ibid.*

6. Land is not forfeited to the State for taxes when one year's tax shall have been due for two years, but only "*where two years of tax shall be due.*" And where the forfeiture is illegal, the owner is not divested of his title. *Nesbitt* v. *Liggitt*, 10 Bush, 137.

7. If, under the act of Feb. 11, 1873, to incorporate a police municipality in Jefferson county, the commissioners did not investigate, etc., and ascertain the deficit to be made up by the taxation of the real estate, then their assessment as to the realty is unauthorized and void. (Clark v. Crane, 5 Mich., 154.) *Bate, &c.* v. *Speed, &c.*, 10 Bush, 644.

8. A tax will not be presumed to be legally imposed, where the action of the officers imposing it is called directly in question by the tax-payer, and their authority denied. *Bate, &c.* v. *Speed, &c.*, 10 Bush, 644.

9. What the law requires to be done for the protection of the tax-payer is mandatory, and can not be regarded as directory. (Clark v. Crane, 5 Mich., 154.) *Bowling Green & Madisonville R. R. Co.* v. *Warren County Court*, 10 Bush, 711.

10. The power to tax must be exercised *in strict conformity* to the terms in which the power is granted; a material departure will be fatal to the attempt to exercise it. (Campbell County Court v. Taylor, 8 Bush, 206; Dillon on Mun. Corp., 104.) *Ibid.*

11. The act of March 8, 1867, providing for assessment and collection of a tax on the income derived from interest paid on U. S. bonds, is repugnant to the constitution of the United States. *Bank of Kentucky* v. *Commonwealth*, 9 Bush, 46.

12. The Evansville, Henderson and Nashville Railroad is subject to taxation, though it purchased the franchise of the Henderson and Nashville Railroad Company, which latter road was, by charter, forever exempt from taxation. *Evansville, Nashville and Henderson R. R. Co.* v. *Commonwealth*, 9 Bush, 438.

13. Leaseholds are to be listed for taxation as personalty—not as real estate. *Wilgus* v. *Commonwealth*, 9 Bush, 556.

14. Taxes voluntarily paid cannot be reclaimed. *Moore, &c.* v. *Bath Co. Court*, 7 Bush, 177.

15. The State can assess the costs of the improvement of streets on the property fronting the same. It can delegate this power to a municipal corporation, and the taxing power of the State is never presumed to be relinquished. *Bradley* v. *McAtee, &c.*, 7 Bush, 367.

16. Contract for sale of brandy, made and sold in violation of the revenue laws of Congress, *held* void. *Creekmore, &c.* v. *Chitwood*, 7 Bush, 317.

17. Tax enforced in favor of Bracken county against citizens of Robertson county. *Bracken Co. Court* v. *Robertson Co. Court*, 6 Bush, 69.

18. Land belonging to Farmers' Bank of Kentucky not subject to taxation for county or State purposes. *Farmers' Bank of Kentucky* v. *Commonwealth*, 6 Bush, 127.

19. Proceedings, by Auditor's agent, to compel delinquents to list property for taxation, are in the name of the Commonwealth. In such proceedings the county court cannot pronounce judgment and order execution for the amounts adjudged against the tax-payers. *McAllister's ex'r* v. *Commonwealth*, 6 Bush, 581.

20. Tax may be imposed upon agents of foreign insurance companies, although none is imposed upon agents of companies created by laws of this State. *Phœnix Ins. Co.* v. *Commonwealth*, 5 Bush, 68.

21. The holder of a determinable freehold estate for life, is legally bound to pay the taxes on it. *Johnson, &c.* v. *Smith*, 5 Bush, 102. If he is not the owner or possessor of the whole tract or lot, he must pay the tax on the interest or share he does possess in it. *Same*, 102.

22. The legislature may create a district for the purpose of taxation or assessment, without reference to existing civil or political districts. *Judge of Shelby Co. Court* v. *Shelby R. R. Co.*, 5 Bush, 225.

23. The depot grounds of the L. & N. R. R. Co. in Warren county not liable to taxation to rebuild court house. *L. & N. R. R. Co.* v. *Warren Co. Court*, 5 Bush, 243.

24. Shares of stock in National Banks liable to taxation of fifty cents on each share. *Commonwealth* v. *First National Bank of Louisville*, 4 Bush, 98.

25. A debt owing by a citizen of another State to a citizen of Kentucky is taxable in this State; but if the fund is employed for his benefit in another State, and is there taxed, it is not taxable here. *Thomas, gd'n, &c.* v. *Mason Co. Court*, 4 Bush, 135.

26. Subscriptions to turnpike roads in Nicholas county by the county judge, under the act of Feb. 9, 1864, and amendments, are void. *Clay, &c.* v. *Nicholas Co. Court, &c.*, 4 Bush, 154.

27. A sheriff who collects money by illegal taxation, on a void subscription, holds the same as trustee for the persons who paid the illegal tax. *Blair, &c.* v. *Carlisle and Jackstown Turnpike Co.*, 4 Bush, 157.

28. The law does not imply a promise, upon the part of the city of Hickman, to make restitution for taxes paid for ten years by mistake of law under which the levy was made. *Hubbard* v. *City of Hickman*, 4 Bush, 204.

29. "Tax-payers of the city taxable under the revenue laws of the State," designates both the person and subject of taxation. Equalization clause construed and explained. *Barrett & Co.* v. *City of Henderson*, 4 Bush, 255. Stemmers of tobacco are not

liable to assessment as merchants, as of April 10th, each year. *Same*, 255.

30. The act of Feb., 1867, authorizing the district of Highlands to improve roads within said district, and levy taxes, cannot be adjudged unconstitutional for invidious or unjust inequality. *Malchus* v. *District of Highlands*, 4 Bush, 547.

31. The owner or possessor of land is required to pay the tax assessed on the value of such land, whether he owns the fee or a life estate. *Arnold* v. *Smith*, 3 Bush, 163.

32. The delinquent in this case ought to have been summoned to show cause why he had not listed with the clerk of the county court, after the return of the assessor's books and before the 1st day of Sept. *Vance* v. *Commonwealth*, 3 Bush, 465.

33. The tax to pay the police commissioners of the city of Louisville and county of Jefferson, does not cease to be a tax because levied on city property alone. *Police Commissioners* v. *City of Louisville*, 3 Bush, 597.

34. A railroad cannot be taxed for local purposes by the counties through which it runs. *Applegate, &c.* v. *Ernst, &c.*, 3 Bush, 648.

35. For a failure to give in a true list of taxable property, the county court has jurisdiction to enforce the penalty and fix the value of taxable estate. No right of action exists for the nonpayment of the taxes until after the assessment has been made as prescribed by law. *L. & N. R. R. Co.* v. *Commonwealth*, 1 Bush, 250.

36. Authority to assess real and personal estate and slaves does not authorize the city council of Louisville to assess money, debts, and choses in action belonging to the inhabitants of the city. (14 B. Mon., 648; 2 Met., 288. *City of Louisville* v. *Henning & Speed*, 1 Bush, 381.

37. Citizens of the State cannot be taxed by it for a national end, nor can the citizens of any State be taxed by both local and Federal legislation for the same national purpose. *Ferguson, &c.* v. *Landram, &c.; Cloud, &c.* v. *Coleman, &c.*, 1 Bush, 548.

REVISED STATUTES.

The General Statutes must be regarded as containing all the statute law on the subjects indicated by the titles therein. When therefore a section in the Revised Statutes has been omitted in the General Statutes or any change made, the whole law as found in the Revised Statutes must be treated as repugnant to the General Statutes. *Broaddus' devisees* v. *Broaddus' heirs*, 10 Bush, 299.

REVIVOR.

Where a defendant dies pending an action, and no personal representative qualifies, it may, under sec. 566 of the Civil Code, be revived against the heirs alone; but the remedy is exclusively equitable, and the action, if at law, should be transferred. *Hagan, &c.* v. *Patterson*, 10 Bush, 441.

REWARDS.

1. Several criminals, for whose arrest and conviction rewards were offered by a railroad company, were apprehended and indicted. The indictments against two, who confessed their guilt, were dismissed in order to use them as witnesses against the others, the attorneys employed by the company to assist in the prosecution indorsing and urging the dismissal. *Held*, the counsel employed by the company were for the time being representatives of the Commonwealth; and, in advising and procuring the dismissal of the indictments, they acted for the company and within the scope of their authority; and the company, through them, having prevented the conviction of the two guilty parties, became liable to their captors for the offered reward. *Louisville and Nashville R. R. Co.* v. *Goodnight, &c.*, 10 Bush, 552.

2. When the governor officially signs a proclamation, offering a reward for the apprehension and delivery of a fugitive from justice, and it is entered on the executive journal, the offer is

complete without further publication. *Auditor* v. *Ballard*, 9 Bush, 572.

3. If, before the offer of the reward is withdrawn, the service is performed, it is the ordinary case of labor done on request; and the contract to pay the reward becomes enforceable. *Ibid.*

4. The person performing such service is entitled to the reward offered, though not aware that it had been offered. *Ibid.*

5. Rewards for the apprehension of offenders offered by private individuals may be enforced. (7 Dana, 29.) *Marking* v. *Needy & Hatch*, 8 Bush, 22.

6. But such reward cannot be claimed by public officers, whose duty it was to make the arrest; nor by any person, unless the party was legally liable to arrest, nor unless the party making it had reasonable grounds for believing that he was discharging a duty to the public. Bail cannot authorize the arrest of the accused by a third person, otherwise than by written indorsement on a certified copy of the bail bond or recognizance. (Sec. 82, Criminal Code.) *Same*, 22.

7. The arrest to be made free of charge to the State of Kentucky: The governor had the right to issue the commission upon the condition expressed, and the acceptance of the commission was a waiver by the agent of his right to compensation. *Booker* v. *Stevenson*, 8 Bush, 39.

RIOT, ROUT, OR BREACH OF THE PEACE.

The only punishment, in this State, for a riot, rout, or breach of the peace, is a fine not exceeding $100, or imprisonment not exceeding fifty days, or both, at the discretion of the jury. *White* v. *Commonwealth*, 10 Bush, 557.

RIPARIAN OWNER.

1. Riparian proprietors of lots originally fronting on the Ohio river are entitled to the land added thereto by accretion, to be ascertained by extending the original river frontage of the respective lots, as nearly as practicable at right angles with the course of the river to the thread of the stream. *Miller, &c.* v. *Hepburn*, 8 Bush, 326.

2. One owner of land has no right to stop the flow of water over his land, so as to overflow an owner above him. *Hahn & Harris* v. *Thornberry, &c.*, 7 Bush, 403.

3. Use of an unimproved bank of the Ohio river in mooring rafts will not create the relation of landlord and tenant, and assumpsit for use and occupation for such use cannot be maintained. *Hall & May* v. *Jacobs & Co.*, 7 Bush, 595.

4. The common law gives, to the owner of land binding on a fresh water river, the title to the thread of the stream, unless the grant excludes it. A sand-bar in the Ohio river is *held* to be private property; and the owner may maintain an action of trespass for entering upon and removing sand therefrom. *Berry* v. *Snyder, &c.*, 3 Bush, 266.

ROADS AND PASSWAYS.

1. Justices of the peace may impose fines on persons for failure to attend and work roads, as provided in sec. 23, art. 1, chap. 84, of the Revised Statutes. *Ayars, &c.* v. *Cox*, 10 Bush, 201.

2. The owner of the land over which a highway passes retains the fee, and all the right of property not incompatible with the public enjoyment; and if the highway is abandoned, the owner holds it without encumbrance. He owns all the minerals in it; and the mines may be worked by him in such manner as not to interfere with the public use. Selling lots bounded by streets is a parol dedication to the public of the street, but it does not divest the owner of the right to the soil. *West Covington* v. *Freking*, 8 Bush, 121. (Angell on Highways, 301).

3. The center of a private street, as well in the city as in the country, opened by the grantor, upon which he sells houses and lots bounding upon it, is the limit and boundary of any lot or lots or land so sold, bounded by such street, &c. *Trustees of Hawesville* v. *Lander, &c.*, 8 Bush, 679.

4. Dismissing an appeal road case is a final order. On an appeal, the law and facts are tried by the court, but the circuit court can not hear any matter of fact other than such as may be certified by the county court; but the circuit court can not afford

the relief that the legislature intended to be done by the county court. To escape danger from locomotive and cars, is a sufficient ground to change a highway, however great the inconvenience to the owners of the land that may result therefrom. This, as well as the land, can be compensated in money. Costs unnecessarily incurred, must be paid by the applicants. *Helm, &c.* v. *Short, &c.*, 7 Bush, 623.

5. The grant of a right of way to a corporation for a specific purpose, to operate a railway. The corporation abandons a part of the way in such manner that neither it nor its vendees can use the right of way contemplated. It thereby abandons its right, and the property reverts to the heirs of the original owner of the land. *L. & N. R. R. Co.* v. *Covington, &c.*, 2 Bush, 526.

6. The Constitution requires the payment of the value of the use of the land taken, without regard to consequential advantages resulting to the owner from the construction of the railroad. *L. & N. R. R. Co.* v. *Glazebrook*, 1 Bush, 325.

SABBATH.

See SUNDAY.

SALARIES.

No deductions, except for neglect of official duty, can be made from the salaries of any and all public officers. *Auditor* v. *Cochran*, 9 Bush, 10.

SALES.

1. See COMMISSIONER'S SALES; CONTRACTS; and JUDICIAL SALES.

2. In sales of cumbrous personal property, where no place of delivery is designated, the law fixes the residence of the vendor as the place of performance. (Wilmouth v. Patton, 2 Bibb, 280; Chandler v. Robertson, 9 Dana, 291.) *Sousely* v. *Burns' adm'r*, 10 Bush, 87.

3. Where property sold is to be delivered between certain dates, failure of the purchaser to designate the day of delivery fixes the last day as that on which performance may be required. *Ibid.*

4. A debtor may sell his personal property exempt from execution, for a valuable consideration, so as to vest the absolute title in the purchaser, or he may mortgage it to secure a debt. *Moxley* v. *Ragan, &c.*, 10 Bush, 156.

5. When the title to property is not to vest in the purchaser until the price is paid, the right of the vendor will not be affected by his recovering personal judgment against the purchaser in an action for the price, the judgment remaining unsatisfied. *Vaughn, &c.* v. *Hopson*, 10 Bush, 337.

6. A sale of property by a bailee, without the consent of the bailor, can not divest the latter of his title. *Ibid.*

7. A promissory note stipulated, "This note is given for a mule, and the mule is bound or the title of the mule remains in H. (the vendor) until he gets his money." *Held*—that it was a conditional sale, and a bailment, if the possession was delivered. And as between the parties, the vendor could recover the property upon failure of vendee to pay the price. *Ibid.*

8. Where there is a conditional sale of chattels and actual delivery to the vendee, a purchaser from the latter without notice of the condition acquires a perfect title. *Ibid.*

9. Where one purchases a chattel and obtains possession by reason of fraudulent representations, and then sells to an innocent purchaser, the title vests in the latter, although as between the vendor and vendee the former can reclaim the property. *Ibid.*

10. In order to create a lien for the purchase-price of chattels, as against a purchaser for good consideration without notice, there must be a conveyance or mortgage to that effect, acknowledged and lodged for record as provided by statute. *Vaughn, &c.* v. *Hopson*, 10 Bush, 337. The case of Patton v. McCane (15 B. Mon., 556) is overruled, in so far as it conflicts with this opinion.

11. All that is essential to the sale of a chattel, at common law, is the agreement that the property in the chattel shall pass from the vendor to the vendee, for a consideration given or

promised. (Parsons on Contracts, 435.) *Newcomb, Buchanan & Co.* v. *Cabell, &c.*, 10 Bush, 460.

12. The title remains in the vendor if, before delivery, the goods must be distinguished or the price ascertained, notwithstanding the contract of sale is otherwise complete. *Ibid.*

13. The delivery of a warehouseman's receipt for property in store, is a symbolic delivery of the property itself, and passes the title to the purchaser; and the warehouseman becomes his bailee. *Ibid.* (Burton v. Lurgan, 40 Ill., 325; Gibson v. Stevens, 8 How., 400; How v. Barker, 8 Cal., 614; Nat. Bank v. Walbridge, 19 Ohio St. R.)

14. A distiller sold whisky stored in his warehouse in barrels, branded with numbers, and delivered to the purchaser a certificate signed by himself as proprietor of the warehouse, attested by the U. S. storekeeper, in which the barrels were designated by numbers, etc.; the price per gallon was agreed, etc. Creditors of the distiller attached the whisky in the warehouse, before it was transported and after it was paid for. *Held*—that the whisky was sufficiently identified, the sale absolute, and title passed. The actual possession was in the storekeeper. *Ibid.*

15. So soon as a bargain of sale is struck, the contract becomes absolute, without actual payment or delivery, and the property and risk of accident vests in the buyer. *Ibid.* (Buffington v. Ulen, 7 Bush, 231; Willis v. Willis, 6 Dana, 48.)

16. It is no defense to an action upon a verbal agreement, that defendant understood it would not be obligatory unless reduced to writing. A contemporaneous agreement to reduce a contract to writing does not make its validity depend upon its being reduced to writing, but is only an agreement to provide a particular kind of evidence of the terms of the contract. *Bell* v. *Offutt*, 10 Bush, 632.

17. The intention of parties in treaty about a contract, must be gathered from their language or conduct, or both, and the legal effect of what they say or do can not be modified by the secret intentions of either. *Bell* v. *Offutt*, 10 Bush, 632.

18. Where a purchaser refuses to receive the thing bargained for, the vendor may consider it as his own, and sue for the difference between the contract and market price; or he may consider it as the property of the purchaser, and sell it with due precau-

tion to satisfy his lien for the price, and then sue for and recover the unpaid balance; or he may consider it as the property of the purchaser, and hold it subject to his call, and sue for and recover the whole price agreed. (2 Parsons on Contracts, 484; Cook v. Brandeis & Crawford, 3 Met., 557.) *Bell* v. *Offutt*, 10 Bush, 632.

19. If the vendor was not the actual owner, yet if he was in a position to deliver the goods and pass a perfect title, he will be regarded as the owner; and refusal of the purchaser to receive them, will render him liable for the difference between the contract and market price of the whole. *Bell* v. *Offutt*, 10 Bush, 632.

20. Covenant to furnish eight barrels of whisky, on or before a particular date, did not pass the title. There must be an actual or constructive delivery. *May, &c.* v. *Hoaglan*, 9 Bush, 171.

SALES OF INFANT'S REAL ESTATE.

1. Commissioner's sale of infant's lands must be made in pursuance of notice, and the notice in pursuance of the judgment ordering the sale. *Cofer* v. *Miller, &c.*, 7 Bush, 545.

2. Purchaser's failure to object to a confirmation of the sale was a waiver of his right to resist payment. The title papers on file, in the suit in which the judgment of sale was rendered, operated as notice to the purchaser of the character of title the court was offering to sell. Such title as the infant had should be passed to the purchaser. The guardian should by supplementary proceedings take steps to make the sale valid. *Huber* v. *Armstrong's widow and heirs*, 7 Bush, 590.

3. Daviess circuit court has no jurisdiction of a proceeding to sell land of infants situated in Nelson county. *Montgomery, &c.* v. *Montgomery*, 2 Bush, 49.

4. Although no assessment or bond has been given, the sale is not void in the sense to prevent a decretal confirmation under the statutes enacted for that purpose. *Cromwell's heirs, &c.* v. *Mason's heirs*, 2 Bush, 439. And real estate unsusceptible of division may be sold, by act of Feb. 15, 1866, Myers' Sup., 751; also by sec. 543, Civil Code. *Same*, 349.

5. Act of Sept. 30, 1861, and amendment March 1, 1862 (Myers' Sup., 424–5), providing how defective sales of infants' estates may be remedied, are constitutional. *Pettit's adm'r, &c.* v. *Johnson*, 1 Bush, 607.

SALE OF TIMBER TREES.

Sale of all the timber upon the vendor's land, to be cut in a particular place, does not pass the title until the trees are marked; and if the vendee cuts them, he is liable to action of trespass by vendor. *Moss* v. *Meshew, &c.*, 8 Bush, 187.

SEDUCTION.

1. The statutory provision (Rev. Stat., chap. 1, sec. 2) that "an action for seduction may be maintained without allegation or proof of loss of service," does not give the right of action to any other persons than those who could maintain it at common law. The relation of master and servant or parent and child must appear in the pleading. *Woodward* v. *Anderson*, 9 Bush, 624.

2. A woman has no cause of action against a man for seducing her. *Ibid.*

3. A father can sue, by the common law or under the statute, for seduction of his daughter. In either action, the margin for damages is about the same. *Pence* v. *Dozier*, 7 Bush, 133.

4. The seduced daughter is a competent witness for the father, and her proof of a marriage contract admissible; and she should not be allowed to prove that her sisters were of unchaste character. *Same*, 133.

5. The testimony of a willing witness, that he had illicit intercourse with plaintiff's daughter debauched by defendant, would be entitled to but little if any credence; and the court should not compel him to answer such a question, to infamize himself. *Same*, 133.

6. A parent may maintain an action for seduction of his daughter, who still lived with him as a member of his family

under his control, although over 21 years of age. *Wilhoit* v. *Hancock*, 5 Bush, 567.

7. The limitation of one year runs from the act of seduction; but against an action by the parent for loss of service and expense consequent on the seduction, the limitation begins to run from her recovery after the child's birth. *Same*, 567. In either action the injury to the father's feelings, and his and his family's dishonor, enter into the consideration of the jury in making up their verdict. *Same*, 567.

SELF-DEFENSE.

See CRIMINAL LAW AND PROCEEDINGS.

SELLING LIQUOR TO MINORS.

The only statute imposing penalties for selling, etc., liquors to minors, without proper authority, is the act of March 22, 1871. The indictment failing to show that the accused was a licensed vendor of spirits, the only penalty that could be inflicted was a fine of $50. *Bear* v. *Commonwealth*, 10 Bush, 8.

SEPARATE ESTATE.

1. Profit and interest accruing from the separate estate of a married woman, when received by her, may be invested in other property, or in providing herself and family with the comforts of life. This income of the wife, and the property acquired by an investment of it, retains its character as separate estate so long as the wife owns or holds it; and the chancellor will see that she is protected in the free use and enjoyment of it, as against the creditors of the husband or her own improvident acts. *Young and wife* v. *Smith, &c.*, 9 Bush, 421.

2. A lien can not be created on the separate estate, by reason of any contract of the husband or wife anticipating the income, in any way so as to deprive herself and family of its beneficial use. *Ibid.*

3. But a court of equity will subject the income of the separate estate to the payment of a liability created by her for necessaries for herself and children, and from which she has derived a full and beneficial consideration. *Ibid.*

SERVICE OF SUMMONS.

1. It is error to render judgment upon service of summons executed on the fourth of July, unless the case is within the exceptions enumerated in sections 733, 734, and 735 of the Civil Code. *Paul* v. *Bruce & Co.*, 9 Bush, 317.

2. A summons, subpœna, etc., may be executed on a holiday, when the officer having the process believes, or the plaintiff, by affidavit, believes, that the process can not be executed after such holiday. *Ibid.*

SET-OFF AND COUNTER-CLAIM.

1. Proceedings to set-off one judgment against another, are not in every respect similar to those to set-off independent and disconnected claims in actions before judgment. *Pfeiffer, &c.* v. *Harris*, 11 Bush (Oct. 13, 1875).

2. One who purchases a judgment to hold as a set-off against a judgment about to be obtained on the same day against him, is defeated by the assignment to another at an earlier day, of the *lis pendens* claim, although he have no notice of the latter. The latter has the superior equity. *Pfeiffer, &c.* v. *Harris*, 11 Bush (Oct. 13, 1875).

3. Suit on note for $170, price of a mule. Defendant alleged by way of counter-claim, that as part of the same contract and as part consideration for which the note was given, plaintiff agreed to deliver him a certain amount of corn. No allegation that the contract about the corn was left out of the writing by mistake or fraud. Demurrer to the answer properly sustained. *McKegney, &c.* v. *Widekind & Co.*, 6 Bush, 107.

4. A receiver cannot retain funds collected by him and offset his own individual claims against the party to whom the same are directed to be paid by order of court. *Johnson* v. *Gunter*, 6 Bush, 534.

5. Estate derived by grand-children under the will of their grandmother, devised directly to them, is not subject to a set-off of a debt due by the father to the grandfather. *Thatcher, &c.* v. *Cannon, &c.*, 6 Bush, 541.

6. A counter-claim which was dismissed in a suit in Indiana for alleged want of prosecution, may be pleaded as a defense in the suit on the Indiana judgment in this State. *Rankin* v. *Barnes*, 5 Bush, 20.

7. A set-off allowed by the laws of this State where the suit is brought, though not allowed by the laws of Tennessee where the note was executed, can be set up by way of defense. *Davis* v. *Morton, Galt & Co.*, 5 Bush, 160.

8. A reply is allowed only to a counter-claim or set-off, and to no other pleading. *Harris* v. *Moberly*, 5 Bush, 556.

9. A purchaser who has received a conveyance, can not resist the payment of the purchase-money on the ground of defects in the title, unless the vendor is insolvent, and the warranty of title or covenant of seizin has been broken. The damages may then be set-off against the unpaid purchase-money. *Trumbo* v. *Lockridge*, 4 Bush, 415.

10. The amount due from school trustees personally to a teacher, may be set-off by him to an action on a note given by him to one of them. *Harrison* v. *Slone*, 4 Bush, 577.

11. In an action by an administrator, a set-off, verified by affidavit and proved, without any demand, may be pleaded by defendant. *Millet & Co.* v. *Watkins' adm'r*, 4 Bush, 642.

12. An administrator being sued on a note of intestate, plead that obligee of the note before assignment had, by force and violence, taken and carried away personal property of the intestate in his lifetime, and relied on it as a set-off. *Held*—to be good. *Eversole* v. *Moore*, 3 Bush, 49.

13. The vendee of personal property is entitled, by plea to an action for the price, to a recoupment of the damages resulting to him from a failure of the consideration. *Miller* v. *Gaither*, 3 Bush, 152.

14. Code requires all defenses, as well legal as equitable, to be pleaded to an action at law; and an equitable right not pleaded may be lost. A partial failure of consideration can be relied on in equity. *Hackett* v. *Schad*, 3 Bush, 353.

15. The vendor of a slave, being a creditor on a note for the price of the slave with personal security, after death of vendee took possession of the slave, and listed him for work on a military road in 1861. Security can set this up as an offset to the note. *Finnell* v. *Meaux*, 3 Bush, 449.

16. Double the value of property unlawfully taken, may be recovered or plead as a set-off, if within "An act to provide a civil remedy for injuries done by disloyal persons," Myers' Sup., 1. *Haddix* v. *Wilson*, 3 Bush, 523.

17. All objection to a defense plead as a counter-claim or set-off, which was not connected with the note sued on, is waived by a replication and issue. *Boyd* v. *Day & Gorrell*, 3 Bush, 617.

18. A set-off can only be allowed to a suit on a contract, and growing out of a contract. (Civil Code, sec. 128.) *Brown* v. *Phillips*, 3 Bush, 656.

19. Allegations of a counter-claim not replied to, are to be taken as confessed. *Cook* v. *Gray*, 2 Bush, 121.

20. In the warranty of a chattel, the purchaser has the right to rely on the warranty, and may return the article, or sue for the breach of warranty, or use it as a defense by way of recoupment. But where the vendee receives manufactured articles, he furnishes conclusive evidence to the warrantor that the article is of the quality covenanted to be delivered. (7 Dana, 327.) *Same*, 121.

21. A set-off, relied on in answer made a cross-petition against other parties, cannot be taken for confessed against plaintiff, until the other parties are brought before the court. *Scott, &c.* v. *Wilson*, 2 Bush, 603.

22. By appropriating property of decedent to his own use, party becomes executor in his own wrong; and the creditor of the decedent may plead this liability as a set-off, in an action against him on a note in favor of the party who made the appropriation. *McKenzie* v. *Pendleton's adm'x*, 1 Bush, 164.

23. Question of set-off must be decided, before a decree for the sale of land is rendered. *Skillman* v. *Hamilton, &c.*, 1 Bush, 248.

24. A counter-claim cannot be pleaded in a reply. *Williams & Davis* v. *Jones and wife*, 1 Bush, 621.

SHERIFF.

1. See BONDS, STATUTORY; INDEMNIFYING BONDS; EXECUTION; and OFFICE AND OFFICERS.

2. Sec. 1, art. 8, chap. 92, Gen. Stat., does not apply to a sheriff appointed to fill a vacancy after 1st Monday in January. *Basham, &c.* v. *Commonwealth*, 11 Bush (Nov. 18, 1875). Such a sheriff is not *ex officio* collector of the revenue, but must first be appointed collector, and then qualify as such by giving bond. *Same.*

3. Sureties in general official bond of sheriff are not liable for his default in collecting taxes. *Anderson, &c.* v. *Thompson, &c.*, 10 Bush, 132.

4. Every bond executed by a sheriff in obedience to law, by which his sureties undertake that he shall discharge a public duty imposed upon him by law as sheriff, is an official bond. (Commonwealth v. Adams, &c., 3 Bush, 41.) *Ibid.*

5. Taxes levied to pay county subscription to a railroad are public dues, within the meaning of sec. 3, art. 2, chap. 26, of the Revised Statutes. *Ibid.*

6. Sureties on bond of sheriff are liable for money collected by him or his deputies on executions or other process; and in an action therefor, the petition must state such facts as show that the sureties are liable according to law. *Griffith, &c.* v. *Commonwealth for use of Hughes, &c.*, 10 Bush, 281.

7. Where fee-bills have been collected and retained, the petition, in an action against the sureties of the sheriff, should aver not merely that the fee-bills were distrainable, but they were in his hands after the 1st of May next succeeding the rendering of the services, and within three years after they were distrainable, and that they had been in the sheriff's hands over six months, or that he had collected them. No demand is necessary to maintain such action, unless plaintiff and sheriff reside in different counties. *Ibid.*

8. Sheriff is liable on his covenant to collect and account for fee-bills, but his sureties are not; they are only liable for money collected on process. *Ibid.*

9. The liability of an officer for failing to sell property taken under an execution is the value of the property, if it is finally

lost and the defendants are insolvent. *Royse* v. *Reynolds*, 10 Bush, 286.

10. The penalty of thirty per centum damages is a liability imposed upon the sheriff and his sureties by statute, outside and independent of the express or implied conditions of their covenant. (Rev. Stat., chap. 36, sec. 4, art. 18.) *Ibid.*

11. Officer's return on execution can be impeached by extrinsic evidence only of the clearest and most convincing character. *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

12. The language, in sec. 6, art. 11, chap. 92, of the General Statutes, as to penalties against defaulting collectors, means that the interest shall be computed from the first day of June preceding the time when the money ought to have been paid into the treasury. *Samuels, &c.* v. *Commonwealth*, 10 Bush, 491.

13. A sheriff failing to collect revenue should be charged, under act of March 22, 1871, with five per cent. on amount uncollected on 1st of April, as shown by the third report in each year. *Culton* v. *Commonwealth*, 9 Bush, 701.

14. In this case, the bond executed Feb. 11, 1867, held to be binding on the sureties therein. *Commonwealth* v. *Cook, &c.*, 8 Bush, 220.

15. A sheriff's bond executed in June (when required by law to be executed in January) is no statutory bond, and creates no lien on the estate of such sheriff. *Hall, &c.* v. *Commonwealth*, 8 Bush, 378.

16. Demand must be made by some one authorized to do so, before suit against sheriff and sureties for residue of county levy in his hands. *Owens* v. *Ballard Co. Court*, 8 Bush, 611. A settlement must be made; and for balance in sheriff's hands an order must be made requiring him to pay it over to the county treasurer, or some other designated person. The creditor to whom an allowance has been made has a remedy by motion or suit on the sheriff's bond. The county may be substituted to the creditor's right by paying him out of other county funds, and in such case the petition should allege the facts, names, amounts, etc. *Same*, 611.

17. The sheriff exonerated from thirty per cent. damages on so much of the debt as he has paid, where he fails in returning execution in the time prescribed by law. *Bank of Louisville* v.

Hurt, &c., 8 Bush, 633. (Act August 28, 1862, Myers' Sup., 213.) The fine must be imposed only by the court. *Same*, 633.

18. An action may be brought against the deputy sheriff, on the deputy's receipt and covenant for the collection of fee bills. *Winterbower* v. *Haycraft*, 7 Bush, 57.

19. To authorize a levy the sheriff must have in his hands an execution in full force. *Savings Institution of Harrodsburg* v. *Chinn's adm'r*, 7 Bush, 539. And after levying a *fi. fa.*, the sheriff has a right to take a replevin bond after the return day. *Same*, 539.

20. Sureties of a sheriff are not released by the failure of the county court to appoint a commissioner to settle the sheriff's accounts concerning the county levy. *Bonta, &c.* v. *Mercer Co. Court*, 7 Bush, 576.

21. Ten per cent. may be recovered on the amount due by a county creditor; but in a proceeding by the county, it can not recover the ten per cent. *Same*, 576.

22. For failing to execute the bond required by law, the sheriff can not be indicted. *Brown, &c.* v. *Grover, adm'r, &c.*, 6 Bush, 1. And it does not *ipso facto* forfeit his office. *Same*, 1. For failing to execute bond to collect the revenue according to law, he does forfeit his office; and if the bond recites that he is sheriff, the obligors are estopped to deny it. *Same*, 1.

23. Sureties of a sheriff have no lien on money collected by him as such, and paid to persons to whom he was indebted. *Clore, &c.* v. *Bailey*, 6 Bush, 77.

24. Sureties of a sheriff are not liable for money collected by him as receiver appointed by the court. *Heeter, &c.* v. *Jewell*, 6 Bush, 510. But when an estate is committed to him as administrator, they are liable. *Same*, 510.

25. After service of process, the sheriff paid the amount of the note sued on to plaintiff's attorney, and took his receipt looking for indemnity to the judgment that should be obtained on the note. He is entitled to it. *Ely, &c.* v. *Harvey, Keith & Co.*, 6 Bush, 620. And the damages the plaintiff would have been entitled to were fifteen per cent. in gross on the amount of the judgment. *Same*, 620.

26. A sheriff failed to return an execution, in favor of a receiver appointed by the court, against an administrator—who

in the meantime paid off some of the claims allowed and directed by the court to be paid. These were, *pro tanto*, a good defense for the sheriff to a suit for failing to make return as aforesaid. *Commonwealth for Peters* v. *Bosley, &c.*, 5 Bush, 221.

27. Sureties in a sheriff's bond are liable for a special tax authorized to be levied after they become such by an act of the legislature. A settlement made by the sheriff after he went out of office, by persons appointed for that purpose, showing balance of county levy due by him, is *prima facie* evidence in an action against the sheriff and his sureties. The bond need not be attested by the clerk; and a word importing the singular number may extend and be applied to several persons or things. *Same*, 221.

28. He is responsible where he has an execution in his hands, whether the defendants had property sufficient to pay the debt or part of it. If there are more defendants in the prior executions than in those subsequently delivered, it is the duty of the sheriff to make all the debts by collecting from the defendants who were not in some of the executions, if he could do so. If he fails to return an execution, by direction of plaintiff or his attorney, he is not responsible. He should state the levy on the execution, and sign it; and if he fails to do so, it may be shown by parol that he made the levy; and if he leaves the property with the defendant, and thereby deprives the plaintiff from making his debt, the sheriff and his sureties are liable therefor. *Commonwealth for Tiffany* v. *Hurt, &c.*, 4 Bush, 64.

29. Sureties on a bond executed in 1865, not liable for money remaining in sheriff's hands collected for county levies previous thereto. *Newman, &c.* v. *Metcalfe Co. Court*, 4 Bush, 67.

30. Money collected by illegal taxation, on a void subscription for turnpike roads, held by the sheriff as a trust fund for those who paid the tax. *Blair, &c.* v. *Carlisle & Jackstown Turnpike Co.*, 4 Bush, 157.

31. As W. B. Ely did not sign the bond sued on, and as there is no county court order approving this bond without his name, it is held not obligatory on the other sureties. *Fletcher, &c.* v. *Leight, Barrett & Co.*, 4 Bush, 303.

32. County courts can remove sheriff for failing to give bonds prescribed by law. *Bartley* v. *Fraine, &c.*, 4 Bush, 375.

33. Without allegation or explanation, no judgment should have been rendered against the sheriff of Harlan county and his sureties, by the Franklin circuit court, on a bond executed in June, instead of January or February as required by law, for the collection of the revenue. *Calloway, &c.* v. *Commonwealth*, 4 Bush, 383. And the county court has power to require the sheriff to execute supplemental bonds, at other terms of the court, for the indemnity of his sureties or the Commonwealth, when he has executed a bond in January or February term of the court. *Same*, 383.

34. He is not bound to receive and collect taxes in arrear and due to his predecessor in office; and his sureties are not liable for them on his official bond. *Middleton, &c.* v. *Caldwell*, 4 Bush, 392. But it is his duty to receive and collect all officer's fees listed with him or any of his deputies, due and payable in his county during his term of office. *Same*, 392.

35. If it appears that the failure to make the debt was not the sheriff's fault, the plaintiff can recover of sheriff thirty per cent. on the uncollected balance of the debt. Act of August, 1862, Myers' Sup., 213, did not apply to this case. *Hill, &c.* v. *Turner*, 3 Bush, 27.

36. An agent empowered to sign a bond for W. J. B., sheriff elect of H. county, is not authorized to sign the old revenue bond of B., which had been executed in February, 1865; but persons who voluntarily signed said bonds became bound thereby. *Commonwealth* v. *Adams, &c.*, 3 Bush, 41.

37. Fee bill for suspending execution by creditor's order is regulated by art. 7, chap. 38, Rev. Stat., 2 Stanton, 522; and the fee bill for selling land under *venditioni exponas*, by act of Feb. 4, 1865 (Myers' Sup., 468). There being only one levy and one sale, the sheriff is not entitled to any more than if the sale had been made under the *fi. fa.* instead of the *venditio.*; and his right to commission is not affected by the quashal of the sale directed by the creditor. *Boyd, &c.* v. *Harper*, 3 Bush, 142.

38. The sheriff was advised that the defendant would leave the city before morning, when the writ for his arrest was placed in the sheriff's hands. Defendant stayed all night at the Planter's House, and crossed over to Indiana at 3 o'clock, next morning, and escaped. Sheriff was guilty of gross negligence and disre-

gard of official duty. *Phillips, &c.* v. *Ronald, &c.*, 3 Bush, 244. Sheriff and sureties liable for whatever part of plaintiff's debt was lost by failing to execute the writ. *Same*, 244.

39. Nothing appearing to the contrary, the court will presume that the sheriff executed the attachments that came first to his hands. *Phelps* v. *Ratcliffe, &c.*, 3 Bush, 334.

40. Sale of more land than is necessary to satisfy the execution, is void; and if sheriff receives commissions for such sale they may be recovered back. *Shropshire, &c.* v. *Pullen*, 3 Bush, 512.

41. Commonwealth can maintain action on sheriff's bond, for official delinquency in criminal cases. *Commonwealth* v. *Reed, &c.*, 3 Bush, 516. Defendant appeared under defective recognizance, and the court permitting the defendant to go on such recognizance, the sheriff is not guilty of any delinquency. *Same*, 516.

42. If the sheriff's return is ambiguous, it is susceptible of explanation by other evidence. *Chamberlin & Tapp* v. *Brewer, &c.*, 3 Bush, 561. And if unambiguous, it may be contradicted in a suit against the sheriff and his sureties. *Same*, 561. The bar to motions (subsec. 2, sec. 5, art. 18, chap. 36, 1 Stanton, 494) does not apply to actions. *Same*, 561.

43. If he fails negligently to arrest one under indictment, when he has a warrant commanding it, or having arrested one under indictment willfully takes insufficient bail, sheriff is liable in a civil action on his bond for damages. *Commonwealth* v. *Reed, &c.*, 2 Bush, 618.

44. An action against a sheriff for failing to return an execution from another county, must be prosecuted in the county of which he is sheriff. *Bank of Kentucky* v. *Harrison, &c.*, 1 Bush, 384.

SHERIFF'S SALES.

See EXECUTIONS; PURCHASERS; and SALES.

SINKING FUND.

1. Profits realized from the penitentiary are dedicated to the sinking fund by the constitution; but the legislature is not deprived of the power to regulate the management of the institution. *Commonwealth* v. *Todd, &c.*, 9 Bush, 708.

2. A contract with the lessee of the penitentiary did not *ipso facto* convert the stipulated rental into a part of the sinking fund; but the contract was subject to the control of the legislature. *Ibid.*

3. The accrued interest on money loaned by the commissioners out of the sinking fund constitutes a part of that fund, and when sued for there can not be set-off against it claims that the party sued may have against the general revenues of the State. *Ibid.*

SLANDER.

1. In actions of slander, pleas of justification must admit the speaking of the words charged; but having admitted it, need not allege their truth. *Harper* v. *Harper*, 10 Bush, 447.

2. Malice in publishing the words is an essential ingredient in the cause of action, and will generally be implied from their mere utterance. But if the words were spoken under circumstances which *prima facie* show a good instead of a bad motive, implication of malice does not arise, but must be made out by extrinsic evidence. (Grimes v. Coyle, 6 B. Mon., 301; Faris v. Starke, 9 Dana, 128; Hart v. Reed, 1 B. Mon., 166; Parker v. McQueen, 8 B. Mon., 16.) *Ibid.*

3. The plea of not guilty, under the former practice, imported more than a denial of the speaking of the words charged, and under it might be shown that the words were used in an innocent sense or on a justifiable occasion; but evidence of the truth of the charge was not permitted. (Williams v. Greenwade, 3 Dana, 432; McGee v. Sodusky, 5 J. J. Marshall, 185; Samuel v. Bond, Littell's Select Cases, 158.) *Ibid.*

4. Under the Code, the defendant in his answer may deny the speaking of the defamatory matter charged, and in a second paragraph admit the publication and allege its truth, and in

still another admit the words, and without averring their truth or falsity, justify by alleging such facts as are relied on to excuse their publication. *Ibid.*

5. Where the answer is merely a denial of speaking the words charged, nothing is admissible in evidence which tends either to prove the truth of the charge or to establish a defense on the ground that they were spoken on a justifiable occasion. (Townshend on Slander and Libel, 211.) *Ibid.*

6. It is not slander to charge that one has falsely taken an oath prescribed by an unconstitutional act. *Burkett v. McCarty*, 10 Bush, 758.

7. The charge that a person is a thief is slander, and actionable. *McNamara* v. *Shannon*, 8 Bush, 557.

8. "He sheared two of Zach. Austin's sheep, meaning to charge that plaintiff had stolen the wool from two of Zach. Austin's sheep;" "Jesse Piner sheared Zach. Austin's sheep, and kept the wool, thereby meaning to charge the plaintiff with larceny;" neither charge is slanderous. The *innuendo* cannot enlarge the legal effect of the utterances properly interpreted and understood. *Brown* v. *Piner*, 6 Bush, 518.

9. In an action of slander, the defendant can plead not guilty, and justify. Good character may be proved by plaintiff in an action for slander, on the issues of not guilty and justification. *Horton* v. *Banner*, 6 Bush, 596.

10. "It's not so!" "It's not so—no such thing!" These words being used by a party to a suit, on a trial before a justice of the peace, in reply to answers made by witness who was being cross-examined, are actionable. The words being susceptible of an offensive and of an innocent meaning, their determination was properly left to the jury. *Dedway* v. *Powell*, 4 Bush, 77.

SLAVES.

The emancipation of slaves by will invested them with their freedom. *Neely, &c.* v. *Merritt, &c.*, 9 Bush, 346.

SPECIAL DEPOSITS.

The president and directors of a bank are answerable for bonds held by the bank on special deposit, and which are fraudulently converted through its officers to its use and emoluments. *Shakers* v. *Underwood, &c.*, 11 Bush (Sept. 7, 1875).

SPECIAL JUDGE.

A cause may be tried before a special judge elected by the members of the bar, although one of the parties does not consent. The circuit judge, being of counsel for one of the parties, can not properly preside in the case. *Smith, &c.* v. *Blakeman*, 8 Bush, 476.

SPECIFIC PERFORMANCE.

1. Specific performance is not a matter of right, but of sound discretion in the court; and will not enforce a contract founded in fraud, imposition, undue advantage, mistake or gross misapprehension. *Petty* v. *Roberts*, 7 Bush, 410.

2. Contract to sell expectancies will not be enforced. *Lowry* v. *Spear, &c.*, 7 Bush, 451.

STAMPS.

1. That clause of the stamp enactment of Congress is *unconstitutional* which provides that contracts made under State laws—unless stamped in the mode prescribed by Congress—shall be void, and that no remedy prescribed by State laws for upholding or enforcing such contracts shall be available. *Hunter* v. *Cobb*, 1 Bush, 239.

2. The want of a stamp does not, in any degree, invalidate any private contract or other writing; nor does it essentially affect any remedy upon same. *Hunter* v. *Cobb*, 1 Bush, 239.

STATE OF KENTUCKY.

1. See ACTIONS, 4, 5, on page 16, *ante*.

2. An individual cannot sue the State; and if, after he has purchased turnpike stocks from the State, through commissioners appointed and authorized to make the sale, the power of the commissioners to transfer the title can be revoked, he would be deprived by indirection of a right that could not be taken from him by direct action. He may, therefore, sue the commissioners, and compel them to perform their duty under the act, so far as may be necessary to secure to him the title to the stock—for to that extent the act is unrepealed. (Blair v. Williams and Lapsley v. Brashear, 4 Littell, 66.) *Baldwin, &c.* v. *Commonwealth, &c.*, 11 Bush (Oct. 15, 1875).

3. The legislature having authorized a sale of turnpike stocks —through commissioners, whose modified terms were accepted by a bidder—his right as purchaser was thus acquired and fixed; and the legislature could not, by repealing the act authorizing the sale, divest him of his right. The State can no more deprive him of his rights under a contract with it, than of his rights under a contract with a private person. *Baldwin, &c.* v. *Commonwealth, &c.*, 11 Bush (Oct. 15, 1875).

4. An act of the legislature authorizing a suit to be prosecuted against the State, and directing—in case judgment is rendered in favor of the plaintiff—that the auditor shall draw his warrant for the amount, and which shall be paid by the treasurer, *is not in conflict with the State Constitution*, sec. 40, art. 2, even though the *yeas and nays* were not entered on the journal on the passage of the bill. *Commonwealth* v. *Jackson*, 5 Bush, 680.

STATE RIGHTS.

See CONSTITUTIONAL LAW; CONFLICT OF LAWS; and PATENTS.

STATUTE OF FRAUDS AND PERJURIES.

1. No permanent interest can be acquired in land, or the right at all times to enter upon it against the consent of the owner,

upon no other evidence than that a parol contract giving this right had been entered into between the parties. The statute of frauds requires the evidences of such a right to be in writing. *Dillon* v. *Crook & Co., &c.*, 11 Bush (Sept. 24, 1875).

2. A parol contract for one year's service, to commence at a subsequent day, is within the statute of frauds and perjuries.

3. After a partial performance, the only remedy is by *quantum meruit*, or some appropriate action other than on the contract itself. *Kleeman & Co.* v. *Collins*, 9 Bush, 460.

4. The statute of frauds and perjuries does not make a contract void; but only declares that no action can be maintained on it. *Ibid.*

5. A letter specifying the terms of the contract made with the servant, if produced, or its contents proved if lost, would be sufficient evidence of the contract to take it out of the statute. *Ibid.*

6. Auctioneer's memorandum is evidence of sale of real estate. *Gill* v. *Hewett*, 7 Bush, 10. And also of personal estate; and a sale of the latter without delivery of possession passes the absolute title, as between the parties to the contract. *Buffington* v. *Ulen*, 7 Bush, 231.

7. A parol promise to pay the debt of another to a third party, for a valuable consideration, is enforced. *Hodgkins* v. *Jackson*, 7 Bush, 342.

8. Agreement to pay a debt "*to* another," is not agreement to pay the debt *of* another. *Spadone* v. *Reed, &c.*, 7 Bush, 455. Thompson's promise to pay the debt of Reed was not made to Reed's creditor, but to Reed himself, and can be enforced, although not in writing. *Same*, 455.

9. A dedication of four acres of land, on which to erect a house of religious worship, can be enforced. *Griffey, &c.* v. *Bryars, &c.*, 7 Bush, 471.

STREETS AND HIGHWAYS.

1. The act of dedicating land to public use for a street or highway, does not of itself convert the land into a public street or highway. There must be some acceptance of the dedication by the county court or town, upon their records, or by continued

use for such a length of time as would imply an acceptance, before an indictment can be maintained for nuisance against those who obstruct travel. *Gedge, &c.* v. *Commonwealth*, 9 Bush, 61.

2. An indictment for erecting and continuing a nuisance by obstructing a street can not be maintained, when there was no acceptance by the town, expressly or by implication, of the dedication of the street by the owner. *Gedge, &c.* v. *Commonwealth*, 9 Bush, 61.

3. A city has a right to charge a bonus for the use of its streets by a street-railway company. *Covington Street-Railway Company* v. *City of Covington*, 9 Bush, 127.

4. A city has no right to authorize the construction of street-railways, without some legislative enactment vesting the municipal authorities with such power. *Ibid.*

5. Sec. 28, chap. 103, Revised Statutes (2 Stanton, 446), does not authorize the county court to close or discontinue a lateral road, when it is apparent that the two roads have not and may never have in one direction any common terminus or place of connection, so that one of them may reasonably subserve the purposes of the other. *Shuck* v. *Lebanon & Raywick Turnpike Road Co.*, 9 Bush, 168.

SUCCESSORS OF TRUSTEES.

Since the adoption of the Revised Statutes, the word "successors" need not be used in the act vesting title in trustees of a town, in order that the title may pass to their successors. *West Covington* v. *Freking*, 8 Bush, 121.

SUNDAY.

1. D. as principal and Y. as surety executed, on Sunday, two notes to C. for money loaned. The contract for the loan was made on that day, and part of the money was paid to D., and a check given for the remainder on that day, which was collected by D.'s son on the Wednesday following. Afterwards, D. received a discharge in bankruptcy. In a suit on the notes, it

was *held*, that the collection of the check was an affirmance of the notes. It further appearing that Y. took an active part in getting the money for D., and informed C. at the time that most of the money to pay him would be realized through Y., being money owing to D. by Y. as administrator, and that Y. failed to disaffirm the contract, but acquiesced in the collection of the check and the retaining of the money gotten on Sunday, it was *held*, that Y. was bound by the affirmance. *Campbell* v. *Young*, 9 Bush, 240.

2. A note signed on Sunday, but not shown to have been delivered on that day, is valid. (12 B. Mon.) *Dohoney, &c.* v. *Dohoney*, 7 Bush, 217.

3. Bail bond executed on Sunday is good. *Rice* v. *Commonwealth*, 3 Bush, 14; *Watts, &c.* v. *Commonwealth*, 5 Bush, 309.

4. A replevin bond signed on Sunday, but delivered on another day, is binding. *Prather* v. *Harlan, &c.*, 6 Bush, 185.

SUPERSEDEAS BOND.

1. The surety in a supersedeas bond is liable to the surety in the replevin-bond. *Kellar* v. *Williams*, 10 Bush, 216.

2. A surety is held to be liable only for costs and damages in a bond superseding a judgment dissolving an injunction. *Steele* v. *Wilson, &c.*, 9 Bush, 699.

3. See BONDS—STATUTORY, &c.

SURETY.

1. See COUNTY COURTS; EXECUTORS AND ADMINISTRATORS; REPLEVIN BONDS; SUPERSEDEAS BONDS; and BONDS, STATUTORY.

2. By the Revised Statutes, a surety who paid the whole or a part of a judgment or decree had a right to an assignment thereof, and to control the same for his own benefit. But if he failed to obtain such assignment for fourteen years, and long after the implied promise of the principal to reimburse the surety was barred by the statute of limitations, he could not obtain it by order of the court without notice to the principal. Whether it could then be obtained even *with* such notice, not decided. *Veach, &c.* v. *Wickersham, &c.*, 11 Bush (June 29, 1875).

3. A surety who paid a judgment against his principal and himself, had by the common law no right to demand an assignment of the judgment to himself; but was compelled to resort to his action on the promise implied by law. (Morris v. Page, 9 Dana, 433; Morris v. Evans, 2 B. Monroe, 86; Alexander v. Lewis, 1 Metcalfe, 407; Joyce v. Joyce, 1 Bush, 474.) *Ibid.*

4. Cashier of national bank, never having executed bond, was guilty of embezzlement, which slight diligence on the part of the directors would have discovered; they published a statement showing honest administration; persons seeing this statement became sureties on cashier's bond, and for his subsequent embezzlements were sought to be held liable. *Held*—sureties were released. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

5. If the directors of a corporation are aware of secret facts materially affecting the obligation of the sureties in an officer's bond, the latter are entitled to have these facts disclosed to them. *Graves, &c.* v. *Lebanon National Bank*, 10 Bush, 23.

6. Sureties in the general official bond of a sheriff are not liable for his default in collecting taxes. *Anderson, &c.* v. *Thompson, &c.*, 10 Bush, 132.

7. Sureties in bond of trustee of the jury-fund are not liable for funds coming into his hands after the expiration of his term. (Sec. 10, art. 1, Constitution of Kentucky; Stevens v. Wyatt, 16 B. Mon., 542.) *Offutt* v. *Commonwealth*, 10 Bush, 212.

8. Sureties for the same debt by different obligations are co-sureties; but sureties in a supersedeas-bond are not co-sureties with those in a replevin-bond, because the liabilities are different. *Kellar* v. *Williams*, 10 Bush, 216.

9. Surety in the replevin-bond, being compelled to pay the debt, was entitled to be substituted to the rights of the creditor, and recover the amount so paid from the surety in a supersedeas-bond, the execution of which had prevented the collection of the debt under the execution. (Brandenburg v. Flynn, 12 B. Mon., 399; Patterson v. Pope, 5 Dana, 241.) *Ibid.*

10. Sec. 8, chap. 97, Revised Statutes, was intended to enlarge the legal and equitable remedy of a surety compelled to pay a debt; and the doctrine of substitution is in no way affected by it. *Ibid.*

11. Where fee-bills have been collected and retained, the petition, in an action to compel the sureties of the sheriff to pay the amount, should aver not merely that the fee-bills were distrainable, but that they were in his hands after the first of May next succeeding the rendering of the services, and within three years after they were distrainable; and that they had been in the sheriff's hands over six months or that he had collected them. *Griffith* v. *Commonwealth for use of Hughes, &c.*, 10 Bush, 281.

12. No demand is necessary to maintain such action, unless the plaintiff and the sheriff reside in different counties, or the fifteen per cent. interest allowed by law is claimed. *Ibid.*

13. The sheriff is liable on his covenant to collect and account for fee-bills; but his sureties are not. *Ibid.*

14. Sureties on sheriff's bond are liable for money collected on process by him or his deputies; and petition in action against them must state facts showing that the sureties are liable according to law. *Ibid.*

15. Sureties of a defaulting common school commissioner are not responsible for money drawn from the treasury by him, unless it was drawn according to law. *Hammond* v. *Crawford, &c.*, 9 Bush, 75.

16. The petition, in action against such sureties, should contain statement of facts necessary to show that the auditor had authority to draw his warrant on the treasurer for the amount drawn by the commissioner. *Ibid.*

17. An agreement of the principals in a note to keep their surety indemnified, by the use and application, as the surety might desire, of a particular fund, in case she should require them to do so, was not such a contract as gave her a valid and enforceable claim against that particular fund. The subsequent transfer of the fund to the surety by the principals when they were insolvent, was an attempt, in contemplation of insolvency, to prefer such surety. *Elliott, Ware & Co.* v. *Harris, Nahan & Co.*, 9 Bush, 237.

18. A surety, against whom a judgment has been recovered, and who has paid the debt, can not recover contribution against his co-surety as to whom the action was barred by limitation. *Shelton* v. *Farmer*, 9 Bush, 314.

19. The sureties of the treasurer of the city of Paducah are estopped from showing that his election by the council was unauthorized, because the time of election had not been fixed, and the term and duties of the treasurer prescribed by ordinance, as required by the act of March 3, 1869. *City of Paducah* v. *Cully, &c.*, 9 Bush, 323.

20. Sureties of city treasurer are not responsible for defalcations during the previous term of that officer, but only for moneys received by him after the execution of his bond. *Ibid.*

21. Action by surety against principal to recover money paid on note. Note not made part of petition, but filed with affidavit for attachment. *Held*—the cause of action on implied promise was good. *Bridges* v. *Reed*, 9 Bush, 329.

22. The surety of an executor, not having covenanted for a faithful performance of his duties *as trustee*, was not responsible for his default as trustee. *Neely, &c.* v. *Merritt, &c.*, 9 Bush, 346.

23. A surety in a trustee's bond brought suit to be released. Court required a new bond, which was executed. Surety in first bond was released. *Moore, &c.* v. *Potter, trustee, &c.*, 9 Bush, 357.

24. Provision of chap. 97, sec. 2, Revised Statutes, that "if a new bond is given the surety shall not be liable for any act of the principal *thereafter*," is a provision for the release of the surety upon the execution of the new bond from all responsibility for acts of the principal, whether prior or subsequent to the execution of said new bond. *Ibid.*

25. A surety in an execution was released from liability by the plaintiff ordering the return of the execution, after it had been levied on sufficient property of a co-surety who had agreed to pay the whole debt. *Martin* v. *Taylor*, 8 Bush, 384

26. Sureties of a trustee appointed by the court to invest funds under its control, can be proceeded against by rule. The presumption from the record is, that the trustee withdrew the money as soon as authorized, although there is no direct evidence that he did so. *Dickinson, &c.* v. *Trout, &c.*, 8 Bush, 441.

27. The liability of sureties in circuit and county court bonds executed by guardian, are equal. *Elbert* v. *Jacoby*, 8 Bush, 542.

28. Sureties of an administrator with will annexed are not liable for funds which he received as agent for the widow and heirs, although he charged himself with such as administrator. *Shields, &c.* v. *Smith, &c.*, 8 Bush, 601.

29. A married woman does not become surety for her husband by executing a mortgage on her land to pay his debt; and although more than seven years elapse after the mortgage debt matures, the mortgage may be foreclosed. *Hobson, &c.* v. *Hobson's ex'r*, 8 Bush, 665.

30. Oral notice to sue is insufficient to release surety. *English* v. *Bourn*, 7 Bush, 138.

31. Discharge of principal in attachment bond in bankruptcy, before judgment, releases the surety. *Payne & Bro.* v. *Able, &c.*, 7 Bush, 344.

32. Surety of tenant, in his covenant to return property in good order, not liable for damages for the failure of tenant to return the house and lot at the expiration of the term, when possession was not demanded. *Kyle* v. *Proctor, &c.*, 7 Bush, 493.

33. An attorney at law employed to collect a debt cannot release sureties by an indorsement directing the return and reissue of the execution. *Savings Institution of Harrodsburg* v. *Chinn's adm'r*, 7 Bush, 539.

34. Sheriff's sureties are not released by the failure of the county court to appoint a commissioner to settle the sheriff's accounts covering the county levy. The doctrine of *laches* does not apply to the government on account of the conduct of its agents. *Bonta* v. *Mercer Co. Court*, 7 Bush, 576.

35. Anything that operates as a novation releases the surety. If property sufficient to pay the debt be delivered to the creditor in discharge thereof, and he afterwards permits the principal debtor to sell the property and retain the price, the surety will be discharged. *Ruble* v. *Norman*, 7 Bush, 582.

36. Confessions of the principal collector, after his discharge from office, that he had embezzled funds, not evidence against sureties. *Pollard* v. *L., C. & L. R. R. Co.*, 7 Bush, 597.

37. A surety is not exonerated from liability by his principal paying or agreeing to pay usury, although such payment or agreement was not communicated to the surety. It would be otherwise, if the payment, etc., was concealed from the surety

for the purpose of inducing him to do what he would not otherwise have done, or had increased the risk taken by him in becoming surety in the note. *Mount* v. *Tappey*, 7 Bush, 617.

38. He may sue a co-surety separately or as a joint defendant with the principal, whenever and as often as he makes payments. *Robinson* v. *Jennings*, 7 Bush, 630.

39. Surety for an executor, etc., is discharged, as to distributee, devisee or ward, when five years shall have elapsed without suit, after the accruing of the cause of action, and after the attaining of full age by the devisee, etc.; but the *laches* of one shall not affect another. Said statute runs against married women, and is not qualified by chap. 63, Rev. Stat., so as to render the savings therein provided in favor of married women applicable, in cases against sureties provided for by sec. 13, chap. 97, 2 Stanton, 400. *Priest, &c.* v. *Warren and wife*, 7 Bush, 633.

40. Answer that the defendant was only surety in the note, and that without his knowledge the principal had advanced usurious interest at the rate of fifteen per cent. for the year during which the face of the note dispensed with interest, and that the fact of such exaction was fraudulently concealed from him when he signed the note, will not afford the surety a defense. *Burks* v. *Wonterline and wife*, 6 Bush, 20.

41. A surety is liable on a note given in place of a previous one, on which he was released by lapse of time, although when he executed the last note he did not know that he was released from the first note. *Buckner* v. *Clark's ex'r*, 6 Bush, 168.

42. Drawer and indorser were joint sureties of the acceptor of an inland bill of exchange, they having executed the same for the accommodation of the acceptor, and with the understanding and agreement that each should pay one-half of the bill if the acceptor failed to pay it. *Edelen* v. *White*, 6 Bush, 408.

43. Sureties of a sheriff are not liable for money collected by him as a receiver appointed by the court; but are, for assets which come to his hands of an estate committed to him to be administered. *Heeter, &c.* v. *Jewell*, 6 Bush, 510.

44. In this case, the principal made six annual payments of interest in advance, as shown by the credits indorsed on the note and established by proof. By receiving from the principal debtor these payments of interest in advance, without the

assent of the surety, the obligees postponed their right of action on the note in consideration of the interest so paid in advance thereon. It was a novation, and the surety was released. *Preston* v. *Henning & Speed*, 6 Bush, 556.

45. T. K. S. was surety of G. J. S. They renewed the note, and H. A. signed it as surety, with the word security appended to his signature. Although G. J. S. testified that he regarded him as equally bound as co-surety with T. K. S., it was *held* that H. A. was surety of both the others. *Salter* v. *Salter, &c.*, 6 Bush, 624.

46. A surety in a judgment debt becomes a principal in the bond by which that judgment is replevied. The failure of the plaintiff to issue execution thereon releases him, but the failure to issue on the bond for one year does not. *Milliken* v. *Dinning*, 6 Bush, 646.

47. Suit by a surety for money paid for the principal is on account, and if against an administrator, an affidavit and proof must be made before suit is brought. *Nuttall's adm'r* v. *Brannin's ex'rs*, 5 Bush, 11.

48. A surety in a bond having the force of a replevin bond, for money loaned by order of court, is released from liability thereon by the failure of the party to whom the money is adjudged to move for a rule or issue execution thereon for more than a year after he is entitled to an execution on the bond. *Wintersmith* v. *Tabor*, 5 Bush, 105. But where the fund is not adjudged to any one, the rule does not apply.

49. Execution on a sale bond issued in 1860, '61, '66, '67. The fund was not adjudged to any one, nor had the court authorized the money to be collected. The sureties were not released. *Haddix, adm'r* v. *Chambers & Little*, 5 Bush, 171.

50. Sureties on a sheriff's bond are liable for a special tax collected by him. *Commonwealth for Mercer Co. Court* v. *Gabbert's adm'r, &c.*, 5 Bush, 438.

51. Proving and filing a note with the master commissioner, in an action by the administrator of the estate of the principal in the note for a settlement, will not prevent the bar of the seven years limitation. *Harris* v. *Moberly*, 5 Bush, 556.

52. A promise by the surety, that the debt should be paid at a named time, which the creditor relied on, is such an obstruc-

tion and hindrance as is embraced by the statute. *Walker and wife* v. *Sayers & Hopkins*, 5 Bush, 579.

53. Surety on a supersedeas bond is not liable, if the clerk was apprised, when he took the bond, that it was not intended to bind the surety until it should be executed by other parties—the others not having signed it. *Whitaker* v. *Crutcher*, 5 Bush, 621.

54. A surety executes a note or bond, in pursuance of a parol agreement with his principal that it is not to be binding upon him except on conditions; and the instrument is delivered to the obligee or officer authorized to accept it, without information to him of such agreement. It will bind the surety. (10 B. Mon., 266; 1 Bush, 48.) *Whitaker* v. *Crutcher*, 5 Bush, 621.

55. A conditional delivery of a bond to a clerk of a court who is authorized to take it: may be delivered as an escrow. (7 J. J. Marshall, 281; 2 Met., 614.) *Same*, 621.

56. Sureties in a note are exonerated, by the plaintiff's forbearing to issue an execution on the judgment for more than a year, in consideration of ten per cent. advance by the principal without the consent of the sureties; and the obligee is presumed to know that they were sureties, from the fact that the note was executed to himself. *Champion, &c.* v. *Robertson*, 4 Bush, 17.

57. A note executed by a partner in his own name, for the use and benefit of the partnership, is binding against the partner who did not sign it; and a surety thereon, after paying the note, has a cause of action against the firm. *Hikes* v. *Crawford & Long*, 4 Bush, 19.

58. Sureties of a sheriff, in 1865, for the collection of the county levy for that year, are not responsible for money remaining in the sheriff's hands collected for county levies for previous years. *Newman, &c.* v. *Metcalfe Co. Court*, 4 Bush, 67.

59. A surety, secured by mortgage, has no right to sue out an attachment against his principal without alleging the insufficiency of the mortgage; but if the defendant induces the plaintiffs to sue out the attachment he cannot defeat the attachment. *Jarboe, &c.* v. *Colvin, &c.*, 4 Bush, 70.

60. Surety in a tenant's bond for rent, may take up the bond and have it assigned to him, so as to substitute him to all the

rights and liens of the landlord. *Smith* v. *Wells' adm'x*, 4 Bush, 92.

61. W. B. Ely did not sign the general bond sued on, and as there is no county court order approving this bond without his name it was not binding on the other sureties. *Fletcher, &c.* v. *Leight, Barrett & Co.*, 4 Bush, 303. When the court has designated certain persons and approved them as sureties, no alteration can be made by leaving off a name or substituting another therefor. *Same*, 303.

62. Sureties in a sheriff's official bond moved the county court for additional surety, "in consequence of official default." Failing to give the required surety, he was removed, and a successor appointed and qualified. *Bartly* v. *Fraine, &c.*, 4 Bush, 375.

63. Sureties of the sheriff of Harlan county not liable in a proceeding, without notice or process, in the Franklin circuit court, for failure of sheriff to pay balance of revenue due and collectable in the year 1866, which was executed at the June term of the Harlan county court, and not at either of the terms required by law. *Calloway, &c.*, v. *Commonwealth*, 4 Bush, 383.

64. Written notice, by a surety in a note, to sue at the next term of the court, may be waived, and an oral notice may be accepted by the holder of the note, with the same effect as if it had been in writing. *Hamblin* v. *McCallister*, 4 Bush, 418. The surety offered to give a written notice, but the plaintiff said, "I do not require a written notice; I waive a written notice; a verbal notice is all that is necessary." This dispensed with a written notice. *Same*, 418.

65. Paying interest without the knowledge or consent of the surety, without any agreement upon the part of the obligees to indulge the obligors for any fixed period of time, or to indulge them at all, does not release the surety. *Offutt, &c.* v. *Glass*, 4 Bush, 486.

66. When the plaintiff issues an execution, a resulting lien on the defendant's property inures to his surety in the appeal bond. If the plaintiff discharges the lien, it discharges the surety on the appeal bond. *Dills* v. *Cecil*, 4 Bush, 579.

67. Defendant executed bond to retain possession of the horse sued for by plaintiff. If plaintiff recovers, he can not proceed by rule against the surety in the bond. His remedy is by action on the bond. *Gay* v. *Morgan, &c.*, 4 Bush, 606.

68. Quashal of an indictment does not deprive the surety in the bail bond of his right to surrender or arrest the accused, and put him in the custody of the court. *Little* v. *Commonwealth*, 3 Bush, 22.

69. Signatures of new sureties, whether signed to old or new bonds by sheriff, will make them official bonds as to such sureties. *Commonwealth* v. *Adams, &c.*, 3 Bush, 41.

70. For any debt paid by a surety to a creditor embraced by the mortgage, the surety will be entitled to stand as a subrogated beneficiary. *Storms, &c.* v. *Storms, &c.*, 3 Bush, 77.

71. Z. Billingsly plead that the plaintiff, D. O. Day, and John P. Billingsly, the other defendant, were partners, and drew the note sued on for the purpose of borrowing money for their business, and that he signed it merely as surety for their accommodation, and for no other consideration. *Held*—that it was a good plea. *Day* v. *Billingsly*, 3 Bush, 157.

72. A note was given by John P. & Z. Billingsly to A. C. R., who assigned it to D. O. D. Z. B. plead that he was surety, and relied on the statute of limitations. It was not necessary for him to prove that the assignee had notice that he was only a surety. The same defense is allowed against the assignee as the assignor. *Same*, 157.

73. Where the surety and creditor ask that the chancellor enforce a lien, to save multiplicity of suits it should be done. *Lusk* v. *Hopper, &c.*, 3 Bush, 179.

74. A surety in the original debt is not responsible to sureties in the replevin bond who pay the debt. *Hammock, &c.* v. *Baker, &c.*, 3 Bush, 208.

75. On a bond executed for property sold by the sheriff for such uses as may hereafter be adjudged by the court, the surety is not released by forbearance to issue execution on the bond for a year after it became due. *Barbee* v. *Pitman*, 3 Bush, 259.

76. W. and D. purchased mules, and in part payment executed a note with L. as surety. Without the knowledge of D., W. and L., by writing, agreed to share and divide equally the profits or

losses of W. This did not make L. liable as a principal on the note. (1 Duvall, 183.) *Lewis* v. *Wright, &c.*, 3 Bush, 311.

77. A surety, both for a firm and for one of the partners, has no right to apply partnership funds—even by the direction of the partner for whom he is bound as surety—to his individual debt, without the consent of the other partner. *Downing* v. *Linville*, 3 Bush, 472.

78. Surety in a bond for money loaned by order of court is not released by failure to issue execution for more than a year after its maturity. *Rankin* v. *White, &c.*, 3 Bush, 545.

79. Surety of a constable not liable for money collected on a demand and mortgage, placed in his hands for collection. *Commonwealth for Arnold* v. *Sommers*, 3 Bush, 555.

80. When they signed the bond, the name of D. V. B. was to it as surety. They acknowledged and signed it in the presence of the county court, which, together with W. J. B., the principal, represented that D. V. B. had signed the bond, and he had not signed it. It was not his act and deed. Wherefore they say it is not their act and deed. *Held*—good. (4 Cranch, 219.) *Chamberlin & Tapp* v. *Brewer, &c.*, 3 Bush, 561.

81. The two sureties in the guardian's bond who took no steps to be released, are liable jointly with the sureties in the new bond —their co-surety in the first bond having been released by order of court. *Boyd* v. *Gault, &c.*, 3 Bush, 644.

82. Where more than one of the sureties were made defendants and served with process, it was improper to render judgment for the whole amount against one of the sureties who contested his liability, and no judgment against the other sureties who made no defense. *Same*, 644.

83. Where the principal debtor and creditor agree, without the consent of the sureties, to pay for forbearance to the creditor for a definite time, that releases the sureties. *Robinson, &c.* v. *Miller*, 2 Bush, 179.

84. The payment of a replevin bond by a surety therein, and its assignment to him, transfers the benefit of any lien existing by virtue of the bond. But it does not revive against third parties any equity or lien which had been merged or waived by the execution of the bond. *Bank of Hopkinsville, &c.* v. *Rudy*, 2 Bush, 326.

85. A surety who signed the bond of a firm—with the agreement, of both obligors and obligees, that two other persons were to sign said bond as co-obligors before it should be delivered—is not liable if the bond is delivered without his consent, or without the signatures of the other persons. *Garvin & Co.* v. *Mobley, &c.*, 1 Bush, 48.

86. A surety in a bail bond for the appearance of the accused at the May term, and no court was then held, but the accused was indicted at the October term, was not released, although no order of forfeiture was made until after the arrest and escape of the principal. *Commonwealth* v. *Branch*, 1 Bush, 59.

87. Exoneration of principal to a note, on a plea of *non est factum*, will not *per se* exonerate his surety, against whom judgment was authorized by the sheriff's return. *Dillingham* v. *Mudd, &c.*, 1 Bush, 102.

88. Under a proper construction of the act of March 10, 1856, to amend the law in relation to guardians, Garrett Watts was released from all liability as surety in the guardian's bond in this case, by order of the county court. *Watts* v. *Pettit's heirs*, 1 Bush, 154.

89. An execution issued on a replevin bond, and was satisfied by sale of land in 1861. The land was recovered under the act of 1856, 1 Rev. Stat., 553; and subjected to payment of all the debts of the principal defendant in the execution. Sureties in the bond released by lapse of time—a second execution having issued on the replevin bond in 1865. *Newman, &c.* v. *Hazelrigg*, 1 Bush, 412.

90. A surety who pays a debt is barred, upon the implied promise of his principal, after more than five years have elapsed. *Joyce* v. *Joyce's adm'r*, 1 Bush, 474. And a surety is entitled to an assignment by sec. 8, chap. 97, 2 Stanton's Rev. Stat., 398, at any time before his claim is barred by lapse of time. *Same*, 474.

91. A fund in the hands of a receiver is potentially and constructively in court, and the court has the power, in any unprohibited mode, to secure its payment. The sureties on a bond that the receiver would account for and pay over all the means in his hands as the court may direct him hereafter, are bound therefor. *Rowlet, &c.* v. *Eubank, &c.*, 1 Bush, 477.

92. When the accused was removed by a provost marshal so that he could not appear, the surety on the bail bond is not liable. *Commonwealth* v. *Webster, &c.*, 1 Bush, 616.

SURVEYS.

1. Vacant land left unsurveyed by mistake is subject to entry. *Bowman* v. *Eggner*, 7 Bush, 68.

2. The surveyor, from the marked lines, is supposed to have made two surveys, and to have abandoned one of them as inaccurate—as he preserved the field-notes of one, and not of the other. The lines indicated by the field-notes must be regarded as the true line. *Slayden* v. *Boswell*, 1 Bush, 421.

SURVIVOR OF ACTIONS.

1. A debtor's right of action for the recovery of property exempted from execution, on his death passes to his widow, for herself and infant children, and not to the personal representative. *Myers' adm'r, &c.* v. *Forsythe*, 10 Bush, 394.

2. Chapter 10, Revised Statutes, gives no right of action to the personal representative, when none had accrued to the decedent; and where death is caused by ordinary negligence, there is no cause of action except against a railroad company, as per sec. 1 of the act of March 10, 1854. *Louisville & Portland Canal Co.* v. *Murphy, adm'r, &c.*, 9 Bush, 522.

TAVERNS, TIPPLING AND COFFEE-HOUSES.

1. A license from the county court alone will not protect an offender from the prescribed penalty for violating the local law. *Freeman* v. *Commonwealth*, 8 Bush, 139.

2. Failing to set up the rates fixed by the county court, the indictment must allege when they were fixed. *Jackson* v. *Commonwealth*, 7 Bush, 99.

3. Permitting games in a coffee-house, for treats of liquor and cigars, is a violation of the statute. (18 B. Mon., 491.) *Stahel* v. *Commonwealth*, 7 Bush, 387.

4. Proprietors of the Galt House are not responsible for articles belonging to a family of boarders under a special contract, which were lost by the burning of the hotel. They were not guests, in the legal sense of the term. *Prima facie*, an innkeeper is liable to restore the baggage of his guest, yet if destroyed by fire he is exonerated—unless he or his servants by negligence caused the fire, or failed to put it out. He is responsible for such things as travelers take with them as traveling paraphernalia; but he is not liable for books, bed-clothing, money, silver ware, especially as to mere boarders. *Vance, &c.* v. *Throckmorton & Anderson*, 5 Bush, 41.

5. Keeper of a house of entertainment needs no license; nor need the keeper of a tavern, unless liquor be retailed therein. *Braswell* v. *Commonwealth*, 5 Bush, 544.

6. Keeping a tippling-house imports an unlawful selling of spirituous liquors by retail. *Commonwealth* v. *Campbell*, 5 Bush, 311.

7. Tavern-keepers may be required to pay a license to towns, by authority of legislative enactment, notwithstanding they have paid both the U. S. and State license. *Mason* v. *Trustees of Lancaster*, 4 Bush, 406.

8. A clerk in the employment of an innkeeper, being entrusted with the key of his safe, procured another key to be made. Knowing that there was a false key, the innkeeper discharged the clerk, but made no change of the safe lock. Some time afterwards the clerk, with the false key, entered the safe and took from it money of a guest. The innkeeper is responsible, notwithstanding he may have told the guest at the time he deposited his money that his safe had recently been robbed, and that he would not be responsible for money deposited in it. He was bound to take extraordinary care of it. *Woodward* v. *Birch, &c.*, 4 Bush, 510.

9. To enforce a lien on the baggage of a guest, the plaintiff must allege that he is a tavern-keeper. That he is proprietor of the Myers House is insufficient. Keepers of boarding or lodging-houses for a season, as at watering-places, cannot retain the goods of guests for charges of lodging, etc. *Southwood* v. *Myers*, 3 Bush, 681.

10. A suspension of the license of a tavern-keeper until the next term of the county court, is a nullity, unless he had been summoned to appear before the county judge at a designated time and place. *Plummer* v. *Commonwealth*, 1 Bush, 26.

11. The common law exacts of innkeepers, as bailees of the baggage of their guests, extraordinary care, and he is presumed to guaranty the fidelity of his household. Wearing apparel, watch, and pocket money are not expected to be delivered to the keeper of a hotel, but they are in his custody, and he is *prima facie* the responsible curator of and liable for $90 kept in the guest's pocket for daily use which was stolen from the room then occupied by him. *Weisenger* v. *Taylor, &c.*, 1 Bush, 275.

TAXATION.

1. See TOWNS AND CITIES; COUNTY COURTS; RAILROADS; and REVENUE AND TAXATION.

2. An assessment to pay for local improvements is not technically a tax. (Matter of Mayor of New York, 11 Johnson, 77; Sharp v. Spier, 4 Hill, 76.) *Johnston* v. *City of Louisville*, 11 Bush (Nov. 11, 1875).

3. An act authorizing the Campbell county court to submit to the legal voters of the county a proposition to subscribe to the capital stock of certain turnpike roads in said county, is not complied with by a submission to the voters of Campbell county outside of the city of Newport. *Judge of Campbell Co. Court* v. *Taylor, &c.*, 8 Bush, 206.

4. The law-making power determines what are the proper subjects of taxation; and it is not within the province of the court to abridge this legislative prerogative. When the subjects of taxation have been determined, the constitutional limitation requiring equality and uniformity in its imposition applies. *Broadway Baptist Church, &c.* v. *McAtee, &c.*, 8 Bush, 508.

5. Improper assessments must be corrected by motion in the county court. *Fox* v. *Long*, 8 Bush, 551. A tenant for a term of years is not liable for the taxes on land, but a tenant for life is. (5 Bush, 102). *Same*, 551.

6. Farming lands in the city of Henderson, exempted from taxation by the city council for city purposes, are not liable for

the payment of subscriptions of stock to the E., H. & N. R. R. Co.; but are liable to be taxed for school purposes, under the act of March 15, 1869. *City of Henderson* v. *Lambert*, 8 Bush, 607.

7. See *Mercer & Garrard Co. Courts* v. *K. R. N. Co.*, 8 Bush, 300.

TELEGRAMS.

A contract made by telegrams is binding on the parties. *Calhoun* v. *Atchison, &c.*, 4 Bush, 261.

TENANTS BY ENTIRETIES.

1. The husband's estate in land held by himself and wife as tenants by entireties, the court is inclined to think, is so fettered by the act of 1846 and the Revised Statutes as to be exempt from seizure and sale under execution. *Cochran & Fulton* v. *Kerney and wife*, 9 Bush, 199.

2. The interest of the husband in land held by himself and wife as tenants by entireties, may be sold by a court of equity, and its proceeds applied to the payment of his debts; provided, it be so done as neither to affect his right of survivorship, nor her right to the enjoyment of the land during her life, whether she survives her husband or not. *Ibid.*

3. The act of Feb. 13, 1846, deprived creditors of a husband of the right to subject to the payment of their debts an estate of this character, in such manner as to deprive him of the possession during the life of his wife. Since its passage, the husband has no interest in his wife's lands which is liable for his debts. (Moore vs. Moore, 14 B. Mon., 208.) *Ibid.*

4. The husband can not by any act of his prejudice his wife's right of survivorship in land held by them as tenants by entireties, and his creditors have no power to deprive her of its enjoyment while it remains undetermined whether she or her husband will ultimately become sole owner of the fee. *Ibid.*

5. A conveyance to husband and wife and their heirs, before the Revised Statutes, constituted them tenants by entireties. The survivor took the whole estate; and neither of them could

sever the estate, nor make it liable for debts as against the other. *Elliott, &c.* v. *Nichols, &c.*, 4 Bush, 502. But since the Revised Statutes, such a conveyance does not constitute them tenants by entireties, unless a right of ownership is contained in the deed. *Same*, 502.

TENDER.

1. See LEGAL TENDER.

2. Plaintiff waived his objection to the character of the money tendered, by withdrawing the currency tendered in court in satisfaction of his debt, on which he was seeking the recovery of a judgment for gold coin. *Wells' adm'r* v. *Robb*, 9 Bush, 26.

3. In an action in which plaintiff is seeking the recovery of a judgment for gold coin, currency was tendered in court and deposited in bank by order of court, to be withdrawn only on the order of court, "or by the plaintiff, if he should accept the same as tendered." *Held*—that in withdrawing the deposit, plaintiff accepted it as tendered, and thereby satisfied his debt. *Wells' adm'r* v. *Robb*, 9 Bush, 26.

4. Neither fraud, without rescission by the return or tender of the slave to the vendor, nor warranty, can entitle the vendee to bar the action for the price. *Miller* v. *Gaither*, 3 Bush, 152.

5. The tender of a deed—which fails to convey in compliance with the contract of sale, or which fails to give a description of the land—is not good. *Williams* v. *Abrahams*, 3 Bush, 186.

6. A contract for the sale of four hundred hogs, averaging three hundred pounds, the smallest hog not weighing less than two hundred pounds, is construed as fixing the minimum average and leaving the maximum unlimited; and such contract is complied with by a tender of four hundred hogs averaging three hundred and twenty pounds, at the time and place agreed upon. For failing to receive them, the vendee is liable for the difference between the contract price and the price at which the hogs were sold, three days afterwards, in the same vicinity; and for interest thereon—it appearing that they were sold at their full market price. *Marshall, &c.* v. *Piles*, 3 Bush, 249.

7. A tender is altogether unavailing, where the amount offered was insufficient, and even that was not re-tendered in court. *Haddix* v. *Wilson*, 3 Bush, 525.

TIPPLING-HOUSES.

See TAVERNS.

TIME.

See DAYS.

TOWNS AND CITIES.

See CORPORATION; CITY OF LOUISVILLE; and NOTICE.

1. A city council having made a contract for the improvement of a street, and failed to take the steps necessary to bind the owners of adjacent property to pay for the work, the city is liable. (1 Metcalfe, 345; 5 Ben. Monroe, 200; 6 Ben. Monroe, 575; 9 Bush, 189.) But the new charter of Louisville makes it otherwise as to that city. *Craycroft, &c.* v. *Selvage, &c.*, 11 Bush (April 16, 1875).

2. When a statute gives a new right or a new power, and at the same time provides a specific, full and adequate mode of executing the power or enforcing the right given, the fact that a particular mode is prescribed will be regarded as excluding by implication the right to resort to any other mode of executing the power or of enforcing the right. (Dillon on Municipal Corporations, sec. 653; 2 Burrows, 1157; 6 Mass., 286; 1 Blackford, 39; 1 Missouri, 147 and 428; 2 McCord, 117; 36 Missouri, 543; 11 Massachusetts, 363; 12 Massachusetts, 482; 4 Wendell, 667; 4 Indiana, 431; 1 Indiana, 285.) *Johnston* v. *City of Louisville*, 11 Bush (Nov. 11, 1875).

3. A municipal corporation possesses no powers except such as are expressly granted, or are necessarily implied from or incident to such as are expressly granted. (25 Iowa, 170; 4 Hill, 76; 1 Blackford, 338; Blackwell on Tax Titles, 448.) *Ibid.*

4. If the remedy given by the statute be not adequate, then there will be an implication that it was intended to be exclusive; and resort may be had, for the execution of the power or the enforcement of the right, to the ordinary process of the law,

i. e. judicial proceeding. (Merriam v. Moody, 25 Iowa, 170; 23 Iowa, 413; 1 Halst., 353; 14 Illinois, 83; 15 Illinois, 9.) *Ibid.*

5. Suits to subject real estate to the payment of taxes cannot, upon principle, be maintained; and sound policy demands that the courts should not sustain them—except in cases where the prescribed mode of enforcing payment would be ineffectual. (Ryan v. Gallatin County, 14 Illinois, 83; Dunlap v. same, 15 Ill., 9.) *Ibid.*

6. The city of Louisville has undoubted power to sell real estate for taxes; and the city auditor has power, under the charter and ordinances, to convey property which may be sold for taxes and not redeemed within the time allowed by the ordinance. *Ibid.*

7. Power to sell for taxes—whereby the citizen is divested of his property without his consent—is a high prerogative power, and must be strictly pursued, or it will be ineffectual. (4 Hill, 76; 12 Connecticut, 436; 19 Ohio, 324; 9 Humphrey, 252.) *Ibid.*

8. To allow suits to sell realty for taxes, and thus subject the tax-payer to the vexation and costs of legal proceedings, instead of the simple and summary mode allowed by the charter, would be to add an intolerable grievance to a burden already sufficiently onerous. A still more exclusive reason, is the fact that the charter and ordinances allow to the tax-payers three years in which to redeem property sold for taxes. *Ibid.*

9. Under certain circumstances, a public body—clothed with power to do an act, in the doing of which the public has an apparent interest—can neither be compelled to do the act, nor made liable for not doing it. (McCormick v. Patchin, 53 Missouri, 33; Macy v. Indianapolis, 17 Indiana, 267.) And in another class of cases, it has been held that, under other circumstances, such a body may either be compelled to do the act authorized, or be made liable for injuries resulting from its failure. (Mayor, &c. v. Furze, 3 Hill, 612, and authorities cited; Huston v. the Mayor, &c., 5 Selden (9 New York, 163.) *City of Henderson v. Sandefer & Co.*, 11 Bush (Nov. 13, 1875).

10. When the omission to exercise the power given clearly appears to have resulted from neglect or from a willful refusal to do that which the public interests plainly require, such omis-

sion will thus be shown not to be in consequence of the judgment of the body, in the exercise of its discretion, that the thing omitted was not necessary or expedient to be done. But when the omission may have resulted from the not unreasonable belief that it was unnecessary or inexpedient, then the decision of the body possessing the power is conclusive. *City of Henderson* v. *Sandefer & Co.*, 11 Bush (Nov. 13, 1875).

11. Whether the public interests require that streets in uninhabited or in very sparsely inhabited parts of the city should be improved, the city council must be permitted to exercise its discretion, and its decision will be final. (Bassett v. City of St. Joseph, 53 Missouri, 290.) *Ibid.*

12. The legislature may empower municipal corporations to establish market regulations. See opinion, for regulations held not unreasonable. *City of Bowling Green* v. *Carson*, 10 Bush, 64.

13. Where one did business as a green-grocer under a license from the city of Bowling Green, it was subject to the right of the city to adopt proper regulations for the public good. *Ibid.*

14. A municipal corporation, owning stock in a bridge company, by its council appointed persons to cast its vote in a meeting of stockholders called to determine whether certain charter amendments should be accepted. *Held*—not essential that the records of council should have shown how the vote was cast, or that it was approved, or that the records of the bridge company should have noted the assent of both agents in casting the vote. *City of Covington* v. *Covington & Cincinnati Bridge Co.*, 10 Bush, 69.

15. Taxation of adjacent property for street improvements in Louisville can not, under the charter of 1870, be imposed on real estate that has been laid out into squares. The assessments are required to be made against lots forming the "*one-fourth of a square;*" and no authority is given to tax any realty for this purpose that does not lie within a tax district so formed. *Caldwell, &c.* v. *Rupert, &c.*, 10 Bush, 179.

16. The authority of municipal corporations to levy taxes is wholly statutory, and must be strictly pursued; and this rule applies to assessments for local improvements. (Dillon on

Municipal Corporations, sec. 605; Kniper v. City of Louisville, 7 Bush, 599.) *Ibid.*

17. A liberal construction will not be given the charter to enable the city government to exercise the power of taxation. *Ibid.*

18. Section 12 of the charter provides that street improvements shall be made "at the exclusive cost of the owners of lots in each fourth of a square." Unless property is situated in a territory so bounded, it can not be deemed any part of a square, and can not be assessed for adjacent street improvements. *Ibid.*

19. The city shall in no event be liable for the cost of street improvements, without having the right to enforce it against the property receiving the benefit thereof. Provided, the city has authority to make the improvements at the exclusive cost of those owning the property to be benefited. *Ibid.*

20. Under the charter of the city of Louisville the general council may cause wells or cisterns to be dug in the public streets at the cost of the owners of adjacent lots, to be apportioned in any equitable mode prescribed by ordinance. *City of Louisville* v. *Osborne, &c.*, 10 Bush, 226.

21. When work done in making street improvements is accepted by the city council of Louisville, adjacent lot-owners cannot resist the collection of the cost thereof on the ground of defective execution. *Murray, &c.* v. *Tucker, &c.*, 10 Bush, 240.

22. The power of municipal corporations to make street improvements at the expense of the adjacent lot-owners is derived solely from legislative enactment, and will be strictly construed. *Ibid.*

23. The city of Louisville alone has power to contract for street improvements therein. Such contracts cannot be altered by the engineer; and a ratification by council of such alteration, will not create an obligation on the part of the lot-owner. *Ibid.*

24. The right of the authorities of a city, with legislative warrant, to permit the construction and operation through its streets of railroads upon which cars are propelled by steam is not now an open question. (Lex. and Ohio R. R. Co. v. Applegate, 8 Dana, 289; Wolf v. Cov. and Lex. R. R. Co., 15 B. Mon., 409; L. and F. R. R. Co. v. Brown, 17 B. Mon., 763;

Newport and Cincinnati Bridge Co. v. Foote, &c., 9 Bush, 264.) *Cosby, &c.* v. *Owensboro and Russellville R. R. Co.*, 10 Bush, 288.

25. Owners of lots bordering on streets hold them subject to the right of appropriation of the street to such public uses as the general good may require, provided such appropriation does not interfere with the use of the street as a public way for foot passengers, horsemen, and the vehicles in ordinary use. *Ibid.*

26. The right to the use of a street is an incorporeal hereditament, legally attached to the ground contiguous thereto—an incident to the title assured by law—a right of which the owners of such contiguous property cannot be deprived without compensation. *Ibid.*

27. Private individuals seeking relief against a public nuisance must show that they suffer an injury distinct from that suffered by the public, and one which the public has not the right to inflict without compensation. *Ibid.*

28. A railroad embankment erected in the middle of the street, with the consent of the city, leaving a passway on either side from six to thirteen feet wide, exclusive of the sidewalk, was not such an appropriation of the street as gave the adjacent lot-owners a cause of action against the railroad company. *Ibid.*

29. The failure of a railroad company to provide proper crossings in a street is not a cause of action in favor of a private individual, unless the municipal authorities have refused to act. *Ibid.*

30. The depreciation of the value of property by reason of the construction and operation of a railroad through an adjacent street, or annoyance from the noise attending the same, is no ground for an action by the lot-owner, nor is an annoyance from smoke and fire, unless he is damaged by their actual contact with his premises. *Ibid.*

31. The title and possession of streets are in the public, and it alone can maintain an action for recovery of possession or for an injury. *Ibid.*

32. The legal effect of a dedication must be determined by its terms, and not by the intentions of the dedicator. *Elizabethtown, Lexington & Big Sandy R. R. Co.* v. *Combs*, 10 Bush, 382.

33. For the uses streets may be put to, and rights of adjacent lot-owners, see Lexington & Ohio R. R. Co. v. Applegate, 8 Dana, 294; 7 Ind., 238; 7 Ohio, 217; 6 Peters, 431. *Elizabethtown, Lexington & Big Sandy R. R. Co.* v. *Combs*, 10 Bush, 382.

34. If a street is so appropriated, even by municipal sanction, as to abridge its use for ingress and egress by adjacent lot-owners, an action will lie against those so appropriating the street. *Ibid.*

35. Where a railroad has been so located in a street as to deprive the owner of an adjacent lot of the means of ingress and egress with an ordinary vehicle, when trains are passing or standing in the street, an action for damages will be sustained. *Ibid.*

36. Damages from smoke, soot or fire from locomotives thrown or blown into or against adjacent houses, in such case, will entitle the owner to recover therefor. *Ibid.*

37. The measure of damage in such cases will be the diminution of the value of the property occasioned by these circumstances, and not the difference between the value of the property before and after the building of the road. *Ibid.*

38. But one recovery may be had for a continuing injury to real property by trespassers. *Ibid.*

39. A cemetery or graveyard can not be subjected to sale to pay for improvements on adjacent streets. *Louisville, &c.* v. *Nevin, &c.*, 10 Bush, 549.

40. The act of April 9, 1873, "for the protection of counties, etc., subscribing stock in railroads, etc.," was not intended as an amendment to any corporation charter, but as a general law, and does not apply to a subscription already fully consummated. (22 How., 364.) *Cumberland & Ohio R. R. Co.* v. *Judge of Washington Co. Court*, 10 Bush, 564.

41. Where there is danger of a misapplication of funds subscribed, courts should refuse to enforce a subscription until the corporation properly secures the appropriation according to the terms of the subscription. *Ibid.*

42. Where a charter provides for suits to enforce liens for the cost of street improvements without prescribing the mode of procedure, the latter will be regulated by the general laws for

the enforcement of liens. *Craycraft, &c.* v. *Selvage, &c.*, 10 Bush, 696.

43. The charter of Louisville gives the city power to improve its highways; and the council may designate in the ordinance the points between which the improvements shall be made. *Ibid.*

44. No error in the proceeding of the general council shall exempt the lot-owners from payment of the costs of street improvements; but the council or courts in which suits are pending shall make all corrections to do justice to all parties. *Ibid.*

45. When, by taking the proper steps, the general council can make street improvements at the cost of owners of adjacent property, its powers may be executed, and the city will not be liable unless it will have the right to proceed to make the property-holders liable. *Ibid.*

46. But if the nature or ownership of the adjacent property is such that it can not be made liable, then the city must pay for the improvements. (Caldwell v. Rupert, 10 Bush, 179; City of Louisville v. Nevin, 10 Bush, 549.) *Ibid.*

47. Persons dealing with a municipal corporation are bound to know that its contracts are made in the mode pointed out by its charter and ordinances; or they must suffer the consequences. *Ibid.*

48. A city has a right to charge a bonus for the use of its streets by a street-railway company. *Covington Street-Railway Co.* v. *City of Covington*, 9 Bush, 127.

49. A city has no right to authorize the construction of street-railways without some legislative enactment vesting the municipal authorities with such powers. *Ibid.*

50. Wharfage privileges at Kentucky City, on the Mississippi river, were not reserved to Ben Edwards Grey as the original proprietor thereof in the establishment of said town. *Memphis & St. Louis Packet Co.* v. *Grey*, 9 Bush, 137.

51. A published map of a town must be taken as the written and recorded representations of the town. *Ibid.*

52. Persons dealing with a municipal corporation, the mode of whose action is limited by its charter, must take notice of the restrictions, and see that the contract is made in the manner

authorized by the charter. *Murphy* v. *City of Louisville*, 9 Bush, 189.

53. Persons dealing with a municipal corporation are bound to take the same notice of its laws and ordinances that a citizen of the state is with reference to legislative enactments. *Ibid.*

54. A contractor having a valid and binding contract, may recover damages against the city when his contract has been violated, or when he has suffered loss by the neglect of the corporation to discharge some duty with reference to the contract of which the contractor is not required to take notice. *Ibid.*

55. Contracts for street improvements in cities must be signed and approved in the manner prescribed by their charters and ordinances. *Ibid.*

56. Contracts for street improvements not executed in the manner prescribed by the city charter and ordinances, are null and void. Nor is the corporation liable for the value of the work, by reason of any implied promise to pay, upon the idea that the city derived a benefit from it. *Ibid.*

57. The city council of Newport had authority to authorize the Newport & Cincinnati Bridge Company to construct a bridge, etc., so as to extend a street of Newport across the Ohio river to Cincinnati; also to grade and elevate the streets approaching the bridge, etc., without obstructing light, air or passway to or from the adjacent lots. Nor have the owners of such adjacent lots any right of action for consequential damages, resulting from such elevation of the streets. *Newport & Cincinnati Bridge Co.* v. *Foote, &c.*, 9 Bush, 264.

58. Owners of property adjacent to an improvement cannot have consequential damages by reason of such improvement, when constructed with care and skill, and not interfering with any private right to light, air or passway; otherwise, actual and direct damages are sustained. *Ibid.*

59. The increase of the duties of a city officer does not imply any obligation to increase his salary. *City of Covington* v. *Mayberry*, 9 Bush, 304.

60. The treasurer of the city of Paducah may be elected by the city council, as prescribed by the act of March 3, 1869, without violating the constitutional provision requiring officers for

cities and towns to be elected. *City of Paducah* v. *Cully, &c.*, 9 Bush, 323.

61. The sureties in the bond of the treasurer of the city of Paducah are estopped from showing that the election of the treasurer by the council was unauthorized, because the time of election and term of office and duties of the treasurer had not been prescribed by ordinance, under act of March 3, 1869. *Ibid.*

62. Sureties of the city treasurer are not responsible for defalcations during the previous term of that officer. They are responsible for moneys received by him after the execution of his bond. *Ibid.*

63. A final judgment of condemnation of land binds the city of Louisville to pay for it. The court cannot enter up judgment on which a *fi. fa.* may issue in such case. The mayor may be compelled, by mandamus issued from the court of common pleas, to issue and sell bonds to pay for the property condemned. *Duncan, trustee, &c.* v. *Mayor of Louisville*, 8 Bush, 98.

64. "Successors" need not be used, in a town charter, to vest title in successors of trustees. *West Covington* v. *Freking*, 8 Bush, 121.

65. Selling lots bounded by streets is a parol dedication to the public, by the owner, of the right to use the streets for all the purposes pertaining to such an easement. The purchasers became the owners to the center of the street. *Same*, 121. The purchasers purchased to the center of the street on one side, and the owner retained the land on the other side. The ground on the side next to the owner laid out as a street became subject to the public use, and the owner remained the title-holder thereto. *Same*, 121.

66. City of Louisville can require the tram-rail to be substituted for the crescent-rail, used in the street-railway tracks. The city cannot refuse to exercise its power to regulate and control its streets, on the ground that it has by contract deprived itself of the right to act. *Louisville City Railway Co.* v. *City of Louisville*, 8 Bush, 415.

67. Amendment of 1865 of charter of Covington, authorizing city council to require northern portion of Madison street to be paved with Nicholson pavement at the cost of the owners of lots

fronting thereon, *held* to be unconstitutional. *Howell, &c.* v. *Bristol, &c.*, 8 Bush, 493.

68. Perfect equality in the imposition of local taxation cannot be attained, but uniformity in the manner of assessment and approximate equality in the amount of the taxation are essential. *Same*, 493.

69. The cost of construction and reconstruction of streets of a city may be imposed upon the owners of adjacent real estate. When the subjects of taxation have been determined, then the constitutional limitation requiring equality and uniformity in its imposition upon such subjects applies. Each subdivision of a territory, bounded on all sides by principal streets, should be deemed a square. *Broadway Baptist Church, &c.* v. *McAtee, &c.*, 8 Bush, 508. The general rule of construction is, that the authority delegated to municipal corporations is to be strictly pursued and construed. But the power that delegates this authority may abrogate the rule of construction. *Same*, 508. Exemptions made by general laws in favor of church property, apply only to taxation for general purposes of government, state, county and municipal. (24 Mo., 20; 11 Johnson, 77; 13 Penn., 107.) *Same*, 508.

70. Farming lands in the city of Henderson exempted from taxation by the city council for city purposes, are also exempt from taxation for the payment of subscriptions of stock to the E., H. & N. R. R. Co.; but are liable to be taxed for school purposes. *City of Henderson* v. *Lambert*, 8 Bush, 607.

71. The centre of a street or highway is the limit and boundary of lots or land bounded by such street or highway. *Trustees of Hawesville* v. *Lander, &c.*, 8 Bush, 679. (West Covington v. Freking, 8 Bush, 121).

72. The act of Feb. 16, 1867, to amend the charter of the city of Newport, which was passed for the sole purpose of extending the limits of said city, is constitutional. *Swift & Co.* v. *City of Newport*, 7 Bush, 37. "No memorial or petition to the legislature praying for the division of a county . . . . . shall be received . . . . . unless the object of such petition shall have been published in writing . . . . . at least two months prior to the meeting of the legislature." (2 Stanton, 120.) The fore-

going statute is advisory, and being disregarded as to this case, was constructively repealed. *Same*, 37. Property not liable to taxation for city purposes on the first of January, may still be taxed by act of the legislature thereafter passed for that year, by extending the city limits. Unfabricated stock in an iron and steel manufacturing establishment situated in said city, is not subject to assessment, nor the manufactured articles therein, destined for sale at the house of the proprietors in Cincinnati. *Same*, 37.

73. The city of Frankfort has the right to keep dogs out of the city, or to provide that, if any citizen should venture the consequences of keeping such pestilent animal within the city limits, he shall be punishable for all damages to the peace and security of the city which may result, even without his fault. *Commonwealth* v. *Steffee*, 7 Bush, 161.

74. When Powell street was partially graded, the city council permitted a portion to be excavated to the depth of eighteen feet. Bryant fell into it, and broke his thigh-bone. He recovered a verdict for $750 against the city, and the judgment was affirmed. *City of Covington* v. *Bryant*, 7 Bush, 248. The city was bound to guard against accidents, by barricades or otherwise. *Same*, 248. If the accident had resulted wholly or partially from his own fault or negligence, he was not entitled to anything. *Same*, 248.

75. An ordinance requiring the owner to apply to the city clerk to register and procure a brass collar duly stamped for each dog, and pay to the clerk two dollars, etc., is a police regulation. *Commonwealth* v. *Markham*, 7 Bush, 486. (5 Bush, 660.)

76. The right to grant licenses may be delegated to cities and towns by the legislature. *Kniper* v. *City of Louisville*, 7 Bush, 599. The general council has the right to grade and class and fix the rate of license, but in so doing is required to keep within the minimum and maximum fixed by the legislature. The authority conferred must conform strictly to the provisions of the statute giving power to pass the ordinance, or its proceedings will be void. *Same*, 599.

77. Sec. 7, art. 3, of the charter of Louisville, requires a journal of the board to be kept. A memoranda kept by the clerk is not such a journal, and defects in the council records can not

be cured, after judgment, by amended act of legislature, March, 1871. *City of Louisville* v. *McKegney, &c.*, 7 Bush, 651.

78. Reconstructing streets in the city of Louisville at the cost of the adjacent lot-owners, is constitutional. *Bradley* v. *McAtee, &c.*, 7 Bush, 667. The taxing power of a state is never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms. And even then the state will not be irrevocably bound, unless some duty is imposed on the tax-payer as the consideration of the grant which the citizens of the state are not generally required to perform; or unless, by the exemption, he is induced to embark in some enterprise or to invest his means in some adventure which, if successful, will result advantageously to the state as well as himself. *Same*, 667.

79. Act of March 9, 1868, amending charter of the city of Covington (2 Sess. Acts, 42), enacts that a majority of the members of the city council forms a quorum. An ordinance in general terms directed the repairing and renewing of certain streets, and specified what kind of repairs and what kind of materials, and empowered the city engineer and improvement committee to superintend and direct said improvement, and to determine to what extent the repairs should be made, and how much of the old material should be used. *Held*—that this ordinance was valid. *City of Covington* v. *Boyle, &c.*, 6 Bush, 204.

80. Irregularities in council proceedings in the city of Covington may be corrected by the court, so that no person's property may be improved at the general expense of the city when in equity he ought to pay for it. (Act February 24, 1865, 1 Sess. Acts, 412.) *City of Covington* v. *Dressman, &c.*, 6 Bush, 210. The lot-owners are not chargeable with the cost of the culverting, in controversy in this case. *Same*, 210.

81. When the absolute title to streets is vested in trustees of a town, and not merely an easement over them for the use of the public, such trustees own the coal which is under the surface of such streets. The title to such streets may be vested by act of the legislature, with the assent and procurement of the owner of the land; and if he afterwards removes the coal from under the streets, he will be liable therefor. *Trustees of Hawesville* v. *Hawes' heirs*, 6 Bush, 232.

82. Where unanimity is indispensable to the legal authority to make an order on the books of a corporation, and such order was entered of record, it should be presumed to have been made with the unanimity required, although that fact does not appear on the record. *City of Lexington* v. *Headley, &c.*, 5 Bush, 508.

83. Contractor bound himself not to sue the city until it should finally be adjudged that the property-owners were not liable for the cost of the improvements on the street in front of their property: This stipulation is void. The city and the owners of property fronting on the street may be sued in the same action. The contractor agreed to keep his work in repair for six months after its reception. This did not exempt the property-owners from payment. *City of Louisville* v. *Henderson, &c.*, 5 Bush, 515.

84. Authority conferred on the trustees of a town to exact the payment of not more than $300 from any person selling spirituous liquors by retail within one mile of the town, is a police regulation, and is not unconstitutional; but if it was a simple tax for municipal purposes alone, it would be unconstitutional. *Trustees of Falmouth* v. *Watson*, 5 Bush, 660.

85. H., in a deed for a lot in Louisville, reserved to himself the right of action against the city of Louisville for wrongfully converting thirty feet in depth of said lot into a street. This did not authorize him to sue for thirty feet of the lot, but only to sue the city for converting it into a street. *Hawes* v. *City of Louisville*, 5 Bush, 667.

86. Trustees of Poplar Plains, being invested with title to a school-house, sold it and reinvested the proceeds in stock in a seminary lot and buildings outside of the town. As the act of Feb. 28, 1860, did not require the reinvestment within the town, the trustees cannot be held responsible for a misapplication of the fund. *Samuels, &c.* v. *Trustees of Poplar Plains*, 4 Bush, 252.

87. When a city is authorized to levy a tax upon the tax-payers of a city, under the revenue laws of the State, such tax must be levied as of the date and upon the same persons and property as prescribed by the revenue laws of the State. *Barrett & Co.* v. *City of Henderson*, 4 Bush, 255.

88. Town authorities being authorized by law may refuse license to sell spirituous liquors to a tavern-keeper therein; and, without it, he cannot sell by paying for and obtaining a license from the United States and from the State. *Mason* v. *Trustees of Lancaster*, 4 Bush, 406.

89. In an action to recover for the cost of a cistern in the city of Louisville, by special ordinance, at the exclusive cost of the owners of property chargeable therefor under the city charter and ordinances, it is necessary to plead the general and special ordinances. (3 Bush, 703.) *Stephens* v. *Guthrie*, 4 Bush, 462.

90. The general council of the city of Louisville may direct the sidewalks to be graded and paved at the cost of the owners of property binding thereon; but it cannot refer to any other body or person the determination of these things. *Hydes, &c.* v. *Joyes*, 4 Bush, 464. Subsequent acts of the council cannot validate an invalid ordinance. *Same*, 464.

91. The payment of a tax or license of $25 on each car of the Louisville City Railway Co., does not exonerate the company from the payment of an *ad valorem* tax on its property, horses, stables, etc., which are assessable for city purposes. *Louisville City Railway Co.* v. *City of Louisville*, 4 Bush, 478. And the exaction of ten per cent. for non-payment of the assessed tax within the prescribed time, is not a penalty, for enforcing which any judicial process is necessary, but is only a provisional and valid increase *pro rata* of the assessment. *Same*, 478.

92. Cities have not the absolute uncontrollable right to order such improvements of the streets as they may deem necessary or beneficial, at the expense of the property-holders, and in utter disregard of their interest and without compensation. It sometimes happens that such improvements will not only render the property entirely valueless to the owner, but more —will take it from him to pay for its own improvement. So long as the improvement is confined to the boundary of the street, and interferes with no private right of light, air or private passway, the incidental injury to the owner will be of that class of misfortunes to them for which no remedy for the injury is afforded by law. *City of Louisville* v. *Louisville Rolling Mill Co.*, 3 Bush, 416.

93. The act of Feb. 24, 1868, providing for the organization of a police force for the city of Louisville and county of Jefferson (1 Session Acts, 1867–8, 633), is constitutional, and the police commissioners elected thereunder are legally entitled to the use of the station houses and other police paraphernalia in said city. *Police Commissioners* v. *City of Louisville*, 3 Bush, 597. "Election," in a constitutional sense and meaning, is used to designate a selection, by the popular voice of a district, county, town or city, or by some organized body, in contradistinction to the appointment by some single person or officer. (3 Met., 207.) *Same*, 597.

94. The legislative act establishing the town of Bradfordsville is sufficient to derive title to a lot-owner, without producing the patent from the Commonwealth. *Calhoon* v. *Belden*, 3 Bush, 674.

95. To authorize the city council of Covington to apportion the expense for work done on a street, and allow a lien upon the lots fronting on such street, the ordinance directing the work to be done must have been enacted on the petition of the owner of the larger part of the ground between the points to be improved, or by the unanimous vote of all the members elect of the city council, as provided in the amended charter, Feb. 3, 1864. *City of Covington, &c.* v. *Casey, &c.*, 3 Bush, 698.

96. In the absence of both allegation and proof of an ordinance authorizing the digging of the well at the cost of the property-holders, dismissing the petition was proper. And the affidavit of the plaintiff's attorney that he did not know of the ordinance until after the suit was dismissed, did not authorize a rehearing. *Babbitt* v. *Woolley, &c.*, 3 Bush, 703.

97. Sec. 15, art. 6, of the new charter of Louisville, must regulate the manner in which Arbegust's thirty-one acres of land within the boundary of the city of Louisville, which is used for agricultural and horticultural purposes, shall be assessed, until he voluntarily divide it into squares or lots, or until the city shall condemn streets through it—when it must pay him for the land condemned, and for other incidental injuries. *Arbegust* v. *City of Louisville*, 2 Bush, 271.

98. The application for the establishment of Kentucky City, etc., did not have the effect to deprive B. E. Grey, the owner and

proprietor, of wharf privileges—as the map of the town shows that these were expressly reserved. If he permits the town authorities to improve the wharves, he will only be entitled to reasonable compensation for the use of the river bank; and his recovery will be limited to the next five years preceding the commencement of the suit. *City of Columbus* v. *Grey*, 2 Bush, 476.

99. The trustees of Glasgow were authorized to levy an *ad valorem* tax on the property, both real and personal, within said town, that is listed for state purposes, including the amount given in under the equalization law—and all the property in said town on the 10th of April, being subject to taxation. *Held*—that money in bank in the town was liable to be taxed, and such as elsewhere was exempt. Upon the refusal to list his property, the assessor should, before proceeding to assess its value, have had the owner cited to appear before the president of the board of trustees, etc. *Trigg* v. *Trustees of Glasgow*, 2 Bush, 594.

100. The board of aldermen of the city of Louisville, acting as a court to try charges against a city officer, is a court of limited jurisdiction; and everything essential to make it such a court must appear affirmatively. *Tomppert* v. *Lithgow*, 1 Bush, 176. All the proceedings in the case against mayor Tomppert were void. *Same*, 176.

101. The trustees of Flemingsburg had the right to excavate within four feet of a stone wall which encroached on the street. *Trustees of Flemingsburg* v. *Wilson*, 1 Bush, 203.

102. Authority to cause to be assessed, at its cash value, such real and personal estate, etc., within the city of Louisville, as the council may designate, does not authorize the council to assess money, debts, and choses in action. (14 B. Mon., 648; 2 Met., 228.) *City of Louisville* v. *Henning & Speed*, 1 Bush, 381.

103. City of Covington is liable for the loss of a coal-boat occasioned by the want of reasonable care and skill in providing proper fastenings for boats when lying at the Covington wharf. *Shinkle* v. *City of Covington*, 1 Bush, 617.

TRADE-MARKS.

Trade-marks intended to deceive and practice a fraud upon the public, will not be protected by a court of equity. *Laird* v. *J. B. Wilder & Co.*, 9 Bush, 131.

TRANSFER FROM STATE COURT TO U. S. DISTRICT COURT.

1. See *Edwards, &c.* v. *Ward*, 2 Bush, 606; (Gorden v. Longest, 16 Peters, 101); *Short* v. *Wilson*, 1 Bush, 350; *Eifort, &c.* v. *Bevins*, 1 Bush, 460.

2. See REMOVAL OF SUITS FROM STATE COURT TO U. S. COURT.

TRESPASS.

1. As each of several wrong-doers is liable for his own act, separate actions may be brought, at the same time or successively, against each of the several trespassers—in each of which the plaintiff may proceed to judgment. As he can claim or enforce only one satisfaction for the same injury, he must elect in which case he will proceed to execution for the satisfaction of his damages. Such election, followed by satisfaction of that particular judgment, will preclude him from proceeding against the others except for the *costs* of each case. (Knott v. Cunningham, 2 Sneed, 210.) *Shakers* v. *Underwood, &c.*, 11 Bush (Sept. 7, 1875).

2. A person assenting to the trespass of his contractor or servant, is liable for the property taken. *Dawson & Young* v. *Powell*, 9 Bush, 663.

3. A dismission or release of one or more who are sued for trespass, cannot *per se* release the others. *Sellards, &c.* v. *Zomes*, 5 Bush, 90.

4. The amnesty act, Feb. 28, 1867, does not apply to unlicensed trespassers, and the act of Feb. 22, 1864, Myers' Sup., 1, applies to guerrillas, or any predatory bands of lawless soldiers not governed by the international laws of war. *Haddix* v. *Wilson*, 3 Bush, 523.

5. A captain of State troops is responsible for forcibly taking possession of, using, injuring, or destroying property in Oct., 1865; and the orders of the quarter-master did not shield the captain. *Hogue* v. *Penn*, 3 Bush, 663.

6. Purchaser of a mare for a valuable consideration from a wrong-doer, does not vest in him title; and his subsequent possession amounts to a conversion for which he is liable. *Chandler* v. *Ferguson*, 2 Bush, 163.

7. County judges have no jurisdiction to try breaches of the peace on their own warrants; and if he does so, he is a trespasser. *Scott* v. *West*, 1 Bush, 23.

8. A military commander cannot seize and destroy or appropriate private property, except in cases of actual emergency. *Farmer* v. *Lewis*, *&c.*, 1 Bush, 66.

9. Where the verdict is for the defendants served in the county of the action, the petition should be dismissed in actions of trespass against defendant served in another county. (Civil Code, sec. 108; 3 Met., 460.) *Ward* v. *George*, 1 Bush, 357.

10. The chancellor will enjoin commission of trespass on private property, to prevent oppressive litigation. *Musselman* v. *Marques*, 1 Bush, 463.

TRUST AND TRUSTEES.

1. See HUSBAND AND WIFE; POWER OF ATTORNEY; SURETY; and WAR.

2. In order to establish a trust, what should be alleged and done. See *Peters, &c.* v. *Bourne, &c.*, 11 Bush (March 22, 1875).

3. If a father waive his marital rights in property given to his deceased wives, and formally settle it upon his children, and qualify as their guardian in order to take the usual guardian care of it, the trust thus created will be enforced, and the sureties in his bond will be bound for the fund. *Tanner, &c.* v. *Skinner, &c.*, 11 Bush (April 13, 1875).

4. Trustee of an express trust may make final settlement in chancery; and the judgment will preclude the *cestui que trust* from asserting claim against him in any other court. In such final settlement, the orders confirming former settlements may be

treated as interlocutory. *Clark and wife* v. *Anderson*, 10 Bush, 99.

5. But in the revision of former settlements, it would not be proper to disallow expenditures or investments made by the trustee with the approval of the chancellor, unless so extravagant or ill-advised as to raise the presumption of fraud, or unless the evidences are directly assailed and shown to be false. *Ibid.*

6. Testator devised property to A. in trust for the sole and separate use of his daughter, etc., and appointed A. guardian and trustee for her, etc. *Held*—that it was testator's intention that A. should be trustee of the estate, with power to manage and control it, and guardian of his daughter; the two offices being separate and distinct. *Ibid.*

7. Trustee of an infant's estate, allowed compensation for his services, must use diligence in investing the trust-funds so as to realize profit. If he use the funds in trade for his own benefit, he should be charged with the actual profits, or compound interest. (Jones v. Foxall, 13 Eng. Law and Eq., 142.) *Ibid.*

8. Greater diligence is required of a trustee receiving compensation than of one acting gratuitously. *Ibid.*

9. In compounding interest on trust-funds used by the trustee for his own benefit, the rests should be regulated by the circumstances of each case. *Ibid.*

10. On funds coming to the hands of a trustee between his stated settlements, he should pay interest, after he has had a reasonable time for investment. *Ibid.*

11. Appreciation of currency in the hands of the trustee inures to the benefit of the *cestui que trust.* Trustee using trust-funds for his own purposes becomes a debtor, and must pay the debt in lawful money. *Ibid.*

12. One holding funds in different fiduciary capacities will be entitled to one commission only, for performing a single duty. *Ibid.*

13. If a trustee must account for bonds and stock as money, he should be allowed a commission on them. *Ibid.*

14. The profits of an estate held in trust for an infant *feme sole* are not subject to the trust; nor will marriage in infancy entitle her to receive the profits, but on arriving at age she will be entitled to receive the accumulated profits and use them, free from her husband's control. *Ibid.*

15. A trustee, selected by the testator, and executing his trust faithfully, should not be removed because unpleasant relations exist between him and the persons interested. *Ibid.*

16. Change of the character of trust-property, from real to personal, will not destroy the trust, or change the fiducial relation between trustee and beneficiary. *Prather, &c.* v. *Weissiger, &c.*, 10 Bush, 117.

17. A note, made payable to one as "trustee," and indorsed by him as "trustee," bore on its face evidence of a trust sufficient to put one on inquiry, and to raise presumption of constructive notice. (100 Mass., 382; 15 Wallace, 171.) *Ibid.*

18. If a depositary of a bill indorse it in breach of the trust, the indorsee with notice of the trust acquires no title as against the rightful owner. (Byles on Bills, 225; Miller v. Edwards, 7 Bush, 398.) *Ibid.*

19. That one of the beneficiaries who indorsed the note in blank with the trustee is estopped to deny the title of a purchaser for value: is affirmed by an equal division of the court of appeals. *Ibid.*

20. Profits and interest accruing from the investment and use of trust-fund belong to the beneficiary of the trust, unless otherwise disposed of. *Young and wife* v. *Smith, &c.*, 9 Bush, 421.

21. Profit and interest accruing from the separate estate of a married woman, when received by her, may be invested in other property, or in providing herself and family with the comforts of life. This income, and the property acquired by an investment of it, retains its character as separate estate so long as the wife owns or holds it; and the chancellor will see that she is protected in the free use and enjoyment of it, as against the creditors of the husband or her own improvident acts. *Ibid.*

22. A lien can not be created on the separate estate, by reason of any contract of the husband or wife anticipating the income, in any way so as to deprive herself and family of its beneficial use. *Ibid.*

23. But a court of equity will subject the income of the separate estate to the payment of a liability created by her for necessaries for herself and children, and from which she has derived a full and beneficial consideration. *Ibid.*

24. In this case, the credit for nine hundred dollars' worth of sheep and cattle was given to the wife, upon the faith of the income from her separate estate, as the writing evidencing the purchase shows. *Held*—that the claims should be paid out of the income accruing from the trust-fund. *Ibid.*

25. The trustee is not entitled to retain his costs and attorney's fees out of the trust-fund, in an action against him to recover the profits and interests realized by him on it, which he ought to have paid without suit. Compensation to executors and trustees being fixed in the will and paid to the first executor and trustee, a subsequent executor and trustee is entitled to an allowance upon the profits of a large and well-managed trust. *Ibid.*

26. Beneficiaries in a trust-deed are necessary parties, in an action to recover the trust-estate. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

27. Where the title is held as a naked trust, with only a limited power to convey, the heirs of a deceased beneficiary are necessary parties to a suit to recover the trust-estate. *Ibid.*

28. A director is a trustee for the corporation; and it is a breach of trust on his part to create any relation between himself and the trust-property, whereby it becomes his interest to subserve his individual interests at the expense or to the injury of such beneficiary or to the trust-property. *Ibid.*

29. The application of the statute of 1820—providing that no sale made by a trustee under a deed of trust shall be good or valid, or pass the legal title, unless decreed by a court, or unless the maker of such deed shall join in the sale—was not intended to be universal in cases of trusts. Certain trusts are exempted from its operation. (3 J. J. Marshall, 236; 5 B. Mon., 164; 6 Dana, 476; 15 B. Mon., 625.) Said act was passed for the benefit of the grantor, and to secure his interest in the property from being sacrificed unless the sale was made with his consent; but where the grantor has no interest, either in the property or the execution of the trust, the statute does not apply. *Prather* v. *McDowell and wife*, 8 Bush, 46. (4 Bush, 43; 16 B. Mon., 230; 17 B. Mon., 543; 2 Bush, 63.)

30. A trust was created by purchasing land at execution sales, upon a verbal agreement between the owner and pur-

chaser, that the latter would hold the land as security for the money advanced and interest, and that the owner should have the right to redeem. *Williams* v. *Williams*, 8 Bush, 241.

31. Land held in trust for the sole and separate use of a married woman, and after her death for her children and heirs, and if she should die without issue living at the time of her death, then the same to pass to her right heirs: She took a life estate, and her children as purchasers under the deed; and at the death of one of the children in infancy, his share passed to his father as his heir. *Churchill* v. *Reamer, &c.*, 8 Bush, 256.

32. A purchaser at a decretal sale induced persons not to bid against him, by giving assurance that on the return of the absent owner he would let him repurchase the property, at the inadequate price at which it was sold. After the owner's return, the purchaser in good faith offered to let him repurchase the property by paying only what it had cost, etc.; but the original owner declined the privilege of repurchasing. This absolved the purchaser from any trust, and left him free to keep or dispose of the property as his own, without responsibility to the original owner. *Roach* v. *Hudson*, 8 Bush, 410.

33. A trustee appointed by the court to invest funds, and his sureties in his bond as such—in case of his failure to invest the funds as required by the court—may be proceeded against by rule, and be required to pay the funds back into court, and the court may institute such proceedings on its own motion; and the return of the funds to the court's commissioner will release the sureties. *Dickinson* v. *Trout*, 8 Bush, 441.

34. The will provided that the right of the third person to use the property should not be subject to alienation or sale, and that her right to use and enjoy the property should be terminated by any attempt to do so by her or any of her creditors. The petition of a creditor of hers, to subject her right to the use of the property or the value of such use, should be dismissed. (8 B. Mon., 56; 12 B. Mon., 479.) *White* v. *Thomas, trustee, &c.*, 8 Bush, 661.

35. Hutchings and Honore in 1861 jointly purchased thirty acres of land, near Chicago, Ill. Hutchings advanced the price, and took the title to himself; and executed a writing in which "it is agreed between the parties that when said land is sold,

Hutchings is first to have his six thousand dollars and ten per cent. interest, and the profits over and above said sum are to be equally divided between said parties. This agreement to continue eighteen months, when, if the property has not been sold, said Honore is to pay one-half of the sum so advanced, with the accrued interest, or Hutchings is to be the sole owner of the same." The land was not sold within eighteen months, and Honore failed to pay any part of the sum advanced. In 1869, Hutchings sold the land for $100,000, and refused to let Honore have any part of it. *Held*—that he was entitled to one-half of it, after paying Hutchings his $6,000 and interest. *Honore* v. *Hutchings*, 8 Bush, 687.

36. Limitation will not constitute a bar, in case of an express trust; and a court of equity alone has jurisdiction. *Clay's adm'x* v. *Clay*, 7 Bush, 95.

37. When property is sold, whether by the tenant for life or a volunteer under him, with the assent of the remaindermen, in order that the proceeds may be held in lieu of the property for the ultimate benefit of those in remainder, the transaction will constitute an express trust between the holder of the fund and those who will be finally entitled to it; and in such case, there is no adverse holding, and no length of time will bar its recovery. (Hill on Trustees, 263; Linn on Trusts, 744; 17 B. Mon., 446.) *Roberts* v. *Robcrts*, 7 Bush, 100. The statute begins to run when the possession of the trustee becomes adverse. (Hill on Trustees, 264; 2 B. Mon., 437.) *Ibid.*

38. A trustee for an idiot is not substituted by the appointment of a committee. *Canady* v. *Hopkins, committee, &c.*, 7 Bush, 108.

39. A voluntary trustee is not entitled to compensation. (2 Mar., 335; 4 J. J. M., 457; 1 B. Mon., 177; Johnson's Chy., 26; Ibid, 527.) *Riddle, &c.* v. *Lewis*, 7 Bush, 193.

40. J. W. Wilgus was made a trustee under a will for his brother "Jarrett" and his children, to manage, invest, and pay over from time to time as he should deem most beneficial. He was thereby authorized to invest, and sell and reinvest, and all the beneficiaries are co-equal in the trust-fund. *Luxon, &c.* v. *Wilgus, &c.*, 7 Bush, 205.

41. A married woman relinquished her dower in a tract of land, on condition that an unmarried daughter should have one hundred acres of land, or its equivalent of $10,000 to secure her a home. The father bought one hundred acres selected by the daughter, and paid for it, and without her consent took the conveyance to himself. She was put in possession of the land, where she continued to reside at the time her father mortgaged it. *Held*—that her possession was sufficient to protect her title against her father's mortgagees. *Faris and wife* v. *Dunn, &c.*, 7 Bush, 276. The trust was established by parol testimony.

42. Wife agreed to sell her land in one county, to be reinvested in another county in land for her separate use. The husband without her consent took the title in his own name. This was sold and reinvested in another tract, and he again, without her consent, took the title in his own name. She agreed to and did sell this latter place for $14,000, with an agreement that $12,000 of the price should be made payable to him for her separate use. These notes were attached by the husband's creditors. *Held*—that they had constructive notice of her rights, and a court of equity would not help them to divest her of these notes. *Miller and wife* v. *Edwards, &c.*, 7 Bush, 394.

43. The wife's general property, during infancy, may be converted into a separate estate by an antenuptial settlement and conveyance to a trustee; and the husband's concurrence is not necessary to conveyance by the trustee, with the wife's concurrence, after she arrives at twenty-one years of age. *Duvall and wife* v. *Graves, &c.*, 7 Bush, 461.

44. Though a testator has not expressly secured the fulfillment of the trust, a failure or renunciation will cause the property to revert to the pretermitted child. *Munday, &c.* v. *Taylor, &c.*, 7 Bush, 491.

45. Devise to one, in trust for another: the trust may be established by parol testimony. *Caldwell, &c.* v. *Caldwell*, 7 Bush, 515.

46. A purchase of real estate, before the Revised Statutes, by A., with the money of B., and conveyance to A. by mistake or otherwise, raised an implied resulting trust. *Ewing* v. *Bibb, &c.*, 7 Bush, 654.

47. Covenant of warranty, though made as trustee, was his own obligation, at least to the extent of the sum he was enabled to realize by so warranting the title. (3 Mar., 385.) *Graves* v. *Mattingly*, 6 Bush, 361.

48. Trust estate of wife, purchased by husband at a decretal sale, freed from the trusts. *Norman* v. *Norman*, 6 Bush, 495.

49. By oversight a trust estate was conveyed to an infant, and the intention of the parties thereby defeated. A court of equity will set aside the deed, even against the wish of such infant. *Hawthorn, &c.* v. *Root, &c.*, 6 Bush, 501.

50. Trustees may settle their accounts in the county court. *McAfee, trustee, &c.* v. *Balden, &c.*, 6 Bush, 537.

51. Estate held by a married woman for herself and children then living, and of any others afterwards born, may be sold by the chancellor upon proper pleadings. *Ormsby* v. *Terry, &c.*, 6 Bush, 553.

52. A trust estate in personal property may be created by parol. (Hill on Trustees, 55; Lenin on Trusts and Trustees, 56.) The owner of property may convert himself into a trustee, without transmitting the possession. (Tiffany and Bullard's Law of Trusts and Trustees, 354.) But to fasten a trust by parol declaration, the language must be clear and explicit. The donor of promissory notes without a delivery to two of his children, is *held*, in this case, to have constituted himself a trustee for their benefit. *Barkley, &c.* v. *Lane's ex'r, &c.*, 6 Bush, 587.

53. Trustee for increasing a fund from $7,725 to $20,366 29, is allowed compensation at the rate of one and a half per cent. per annum on the trust fund, and charged six per cent. per annum, compounding the interest at biennial rests. The fund was charged with the costs of the litigation. *Fleming* v. *Wilson and wife*, 6 Bush, 610.

54. A trustee who, in a matter of judgment or discretion has fallen into an error, is not liable for loss where he has acted in good faith, and not been guilty of gross negligence. *Salter, &c.* v. *Salter, &c.*, 6 Bush, 624. And a court of equity will release trustees, acting upon professional advice, or the best judgment they could procure, from the losses of the trust property. (4 Johnson's Ch'y Rep., 619; Hill on Trustees, 572; 2 Story's Equity, sec. 1272.) *Same*, 624.

55. A trustee with trust funds in his hands cannot, at a decretal sale, become purchaser of the trust estate, and hold it for his own use. *Mitchell, &c.* v. *Moore, assignee, &c.*, 6 Bush, 659.

56. Where the deed is made to one, and the consideration paid by another person, no use or trust shall result in favor of the latter. (Sec. 20, chap. 80, Rev. Stat., 2 Stanton, 230.) Where a deed, before the Revised Statutes, was made to one, and the consideration was paid by another, a trust resulted in favor of the latter. If the latter, since the Revised Statutes, refuse to convey, he is liable for the money advanced, unless the deed was made to defraud creditors. *Martin* v. *Martin, &c.*, 5 Bush, 47.

57. An absolute conveyance was made to discharge an indebtedness, and the grantee agreed to reconvey by parol upon payment of his debt and interest in a reasonable time, and refused to have this verbal agreement embodied into the written contract. The evidence failed to show that the consideration was not the fair value of the land. *Held*—it could not be enforced. *Harper* v. *Harper*, 5 Bush, 176.

58. The acts amending chap. 86 of the Rev. Stat., of 1854 and 1858 (2 Stanton, 312, 314), contemplate sales of interests conveyed to a woman during life and to her children, if any, and if none, to her husband and his heirs for reinvestment without any report of commissioners. (3 Bush, 383.) *Griffith* v. *Burton and wife*, 5 Bush, 358.

59. Where the husband, by agreement, takes proceeds of his wife's land, and purchases another tract, agreeing that it shall be conveyed to her, and takes a bond to himself, and dies, the statute does not apply; but a trust results in favor of the wife, even against creditors. *Mallory* v. *Mallory's adm'r*, 5 Bush, 464.

60. The profits of a fair held by colored people are required to be applied to the purposes for which the fair was held. *Morton and wife* v. *Smith, &c.*, 5 Bush, 467.

61. Husband and wife conveyed real estate to a trustee, with power to sell. Conveyance of the estate, in which the husband and wife joined, passed the title. *Belknap* v. *Martin*, 4 Bush, 43.

62. Where a deed of trust vests separate property in a married woman, expressly authorizes its subjection to her creditors,

any one of them may proceed without making the others parties. *Goldburg and wife* v. *Drabelle*, 4 Bush, 426.

63. Land placed in the hands of a trustee for the benefit of emancipated negroes, depriving them of the right to sell, etc., constitutes a community of property, and the court properly dismissed the petition for a sale and partition of the property. *Robinson, &c.* v. *Johnson, ex'r, &c.*, 4 Bush, 433.

64. An estate held for life, or in trust for life, with remainder to children, under act of Feb. 16, 1858 (2 Stanton, 314), may be sold and reinvested. *Allen* v. *Graves, &c.*, 3 Bush, 491.

65. Private sales by trustees pass no title, except where the maker of the deed of trust shall unite in the conveyance. *Smith's ex'r* v. *Vertrees, &c.*, 2 Bush, 63.

66. A house and lot were conveyed to a trustee for the use of his wife for life, and at her death to the issue of herself and husband, if any, and if none, etc., they mortgaged the same. Her estate for life, and the remaining interest of the husband only, liable to be sold *Bowen* v. *Sebree and wife*, 2 Bush, 112.

67. A devise to trustees, to sell within two years and invest the proceeds in stocks, etc., and at the expiration of ten years divide the principal equally between testator's three daughters, does not authorize them to sell or dispose of the lot after ten years from the recording of the will. *Bakewell, &c.* v. *Ogden, &c.*, 2 Bush, 265.

68. Husband cannot lease land held in trust for his wife. *Carter, &c.* v. *Carter*, 2 Bush, 288.

69. Purchaser of land at commissioner's sale agreed with the owner that he would buy it, and that if the owner would pay his proportion of the price within a specified time, he should retain a specified quantity of the land. Enforced. *Miller's heirs* v. *Antle*, 2 Bush, 407.

70. When land is held by a trustee, he shall be a party to proceedings for its sale if held for infants, and he must give bond and security where the proceeds are to go into his hands. (Sec. 545, Civil Code.) *Parks, &c.* v. *Fry*, 2 Bush, 433.

71. A trustee or executor will not be permitted to create an interest in himself opposite to the party for whom he acts, or traffic in the estate for his own emolument. *Faucett* v. *Faucett, &c.*, 1 Bush, 511.

TRUSTEE OF THE JURY FUND.

1. The term of office of a trustee of the jury fund is four years, and he can not act by virtue of his original appointment after its expiration. *Offutt* v. *Commonwealth*, 10 Bush, 212.

2. Sureties in bond of trustee of jury fund are not liable for funds coming into his hands after the expiration of his term. (Sec. 10, art. 6, Constitution of Kentucky; Stevens v. Wyatt, &c., 16 B. Mon., 542.) *Ibid.*

3. Trustee of jury fund is an officer, authorized to collect and receive public moneys within the meaning of sec. 1, art. 12, chap. 83, Revised Statutes; and may be proceeded against by motion for failure to pay funds into the treasury, as required by law. *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

TRUSTEES OF TOWNS.

See SUCCESSORS OF TRUSTEES; and TOWNS AND CITIES.

TURNPIKES.

1. Turnpike company can accept conditional subscription of stock by county court. *Mercer Co. Court* v. *Springfield, Maxville & Harrodsburg Turnpike Co.*, 10 Bush, 254.

2. Limitation runs against a stockholder in a turnpike company as to dividends appropriated by the corporation. *Ibid.*

3. Where a turnpike company abandons a material part of its road, its charter may be forfeited without the aid of a statute. *Kenton Co. Court* v. *Bank Lick Turnpike Co.*, 10 Bush, 529.

4. The general authority of a railroad company to condemn a right of way will not authorize the condemnation of a highway. *Ibid.*

5. Section 28 of chapter 103, Revised Statutes (2 Stanton, 446), does not authorize the county court to close or discontinue a lateral road, when it is apparent that the two roads have not and may never have in one direction any common terminus or place of connection, so that one of them may reasonably subserve the purposes of the other. *Shuck* v. *Lebanon & Raywick Turnpike Road Co.*, 9 Bush, 168.

UNLAWFUL CONTRACTS.

1. Courts of equity will not relieve either of two parties equally concerned in illegal transactions. (Story's Eq., 298; 11 Mass., 377; Cowper, 792; Bibb v. Bibb, 17 B. Mon., 307; Brookover v. Hurst, 1 Met., 668.) *Marksbury, &c.* v. *Taylor, &c.*, 10 Bush, 519.

2. An executed contract, based upon illicit sexual commerce, can not be set aside at the instance of the grantor or his heirs. *Ibid.*

UNLIQUIDATED ACCOUNTS.

See INTEREST; and DAMAGES; and the case of *Adams Express Co.* v. *Milton*, 11 Bush (March 19, 1875).

USURY.

1. See NOVATION; and INTEREST.

2. An agreement, indorsed upon a bill of exchange, to pay an attorney's fee if suit is brought, is not an agreement to pay a rate of interest exceeding ten per cent., and is not usurious. *Gaar, &c.* v. *Louisville Banking Co.*, 11 Bush (Sept. 9, 1875).

3. The payment of usury is not void, and does not raise an implied promise on the part of the person receiving to refund it. The obligation to refund could only arise upon the personal election of the party praying to reclaim it, and until such election was made the creditors of him who paid the usury could not reach it as a chose-in-action. (Estill v. Rodes, 1 B. Mon., 314; Wood v. Gray, 5 B. Mon., 92; Booker v. Gregory, 7 B. Mon., 441.) *Smith* v. *Young, &c.*, 11 Bush (Oct. 13, 1875).

4. The modern rule is, that as long as the debt exists upon which usury has been paid, although the evidences of such indebtedness have been repeatedly renewed, usury paid at any time may be reclaimed so long as any part of the debt remains unpaid. But that rule does not apply in this case—in which, *by a new note and a change of parties*, the old debt has been extinguished and a new debt created. *Smith* v. *Young, &c.*, 11 Bush (Oct. 13, 1875).

VACANT LANDS.

The same person can purchase and obtain several orders of the county court, each for two hundred acres of vacant land, or any less number, not less than twenty-five acres each. *Register* v. *Reid*, 9 Bush, 103.

VARIANCE.

Allegation of individual contract, and proof of partnership contract, is not a ground of non-suit. If non-joinder of a defendant appears on the face of the petition, it is demurrable; if it appear by the evidence, the defect must be relied on in the answer, or it will be regarded as waived. (Albro v. Lawson, 18 B. Mon., 642; Civil Code, sec. 123.) *Waits* v. *McClure*, 10 Bush, 763.

VENDOR AND VENDEE.

1. See CHAMPERTY; and OCCUPYING CLAIMANTS.

2. To pass the title to real estate the conveyance must not only be executed, but must be accepted. (2 Washburn on Real Property, 581.) *Commonwealth, &c.* v. *Jackson, &c.*, 10 Bush, 424.

3. For the satisfaction of lien notes, the circuit court has jurisdiction to sell the land, on constructive service, without the levy of the attachment on the land. *Thomas* v. *Mahone*, 9 Bush, 111.

4. A conveyance will not be set aside at the suit of the vendor's creditors as fraudulent, unless it appears that the vendee had notice of the fraudulent intent. *Beadles and wife* v. *Miller, Gardner & Co.*, 9 Bush, 405.

5. Grantee, exacting special warranty of title under circumstances implying knowledge that the property was held in trust, is not an innocent purchaser, entitled to hold against the beneficiary of the grantor. *Covington & Lexington R. R. Co.* v. *Bowler's heirs, &c.*, 9 Bush, 468.

6. Grantee, having knowledge of grantor's trust relation when he purchased the railroad, is put upon inquiry touching the character of his title, and is not an innocent purchaser. *Ibid.*

7. The rights of vendees with warranties, how adjusted in case of recovery against them. *Proctor, &c.* v. *Smith, &c.*, 8 Bush, 81.

8. A verbal agreement, at the time of the execution of the deed, that the vendor should hold possession during his life, will be enforced in equity. *Carpenter, &c.* v. *Carpenter*, 8 Bush, 283.

9. Vendor by executory contract should make and tender a good deed, before vendee can have specific execution. *Cavin & Elliott* v. *Williams & Ray*, 8 Bush, 343.

10. For vendor's lien and assignee's lien, see title LIEN.

11. Covenant of title implies a good title. But the plaintiff was not entitled to an exhibition of title by alleging that the defendant had not and never had a good and perfect title, and that his title was defective. *Davis* v. *Dycus*, 7 Bush, 4.

12. Vendor fraudulently misrepresented the quantity and boundary of land conveyed in this case, and the contract was rescinded. *Upshaw, &c.* v. *Debow*, 7 Bush, 442. Defect of title alone will not authorize rescission of executed contract; but if the contract be tainted with fraud, it vitiates the whole transaction. The vendee is not bound to examine vendor's title papers. He may rely on vendor's statement, and if not true, vendor must suffer. *Same*, 442.

13. Expectancies are not the subjects of valid sales. *Lowry* v. *Spear, &c.*, 7 Bush, 451.

14. Vendee accepting a deed must look to his warranty, unless vendor is a non-resident or insolvent. Infancy of vendor is no defense to action for purchase money. *Hall's adm'r, &c.* v. *Priest, &c.*, 6 Bush, 12.

15. Deed duly acknowledged and lodged for record passes the title, and a subsequent vendee under execution may pay the tax and have the deed recorded. *Knight* v. *Whitman*, 6 Bush, 51. Deed executed and delivered passes title without being lodged for record. EDITOR.

16. Specific execution when conscientious will be enforced by a court of equity. *Spalding* v. *Alexander, &c.*, 6 Bush, 160.

17. Parol vendor adhering to his contract, his creditors can not interpose between him and his vendees in possession, merely because the contract is not in writing. *Crawford* v. *Woods, &c.*, 6 Bush, 200.

18. Land sold by an heir is not liable for the debt of ancestor, in an action brought after the alienation. *Anderson* v. *Summers*, 6 Bush, 423. And the vendee of the heir purchasing under an execution on such judgment does not constitute an eviction. *Same*, 423.

19. Vendor took three notes for purchase money, and assigned two to one and the third to another party, and made a deed pretermitting the latter as a lien note. *Held*—that it did not deprive the assignee of a lien. *Guy* v. *Butler, &c.*, 6 Bush, 508.

20. Deed not recorded within eight months does not pass contingent right of dower. *McGuire* v. *Bowman, &c.*, 6 Bush, 550. Is not the law changed by the General Statutes? EDITOR.

21. Husband, as trustee for wife, enchanged her slaves for a tract of land, executed his note as trustee for difference in price, and took a bond for a conveyance to himself as trustee, etc. They exchanged the land for a tavern-house, etc., and assigned the bond to the party with whom they exchanged, but did not advise him of the note that was a lien on the land. The land and tavern-house, etc., were subject to the payment of the note. *Child, Pratt & Co.* v. *Burton and wife*, 6 Bush, 617.

22. For ameliorations to land made by a parol purchaser, he is entitled to compensation, against his vendor and against privies claiming under him. *Glass* v. *Abbott*, 6 Bush, 622.

23. Vendees are entitled to an unencumbered title before paying for land conveyed to them, with general warranty, if the vendors are non-resident or insolvent. *Hatcher and wife* v. *Andrews*, 5 Bush, 561. That no ardent spirits were ever to be vended in said house or on the premises, in large or small quantities, and if done the property to revert to the grantors: this reservation will be upheld. *Same*, 561.

24. For the consideration of $300, F. sold to B. a certain tract of land, supposed to contain 110 acres more or less. The tract contained 172 acres. B. was only entitled to a conveyance of 110 acres. (2 Dana, 258; same, 6.) *Fannin* v. *Bellomy*, 5 Bush, 663.

25. If the written agreement of the sale of lands were voidable for uncertainty when first executed, this impediment may be removed by the subsequent acts of both parties. *Overstreet* v. *Rice*, 4 Bush, 1.

26. When by mistake, oversight or fraud, the deed does not conform to the contract, equity will reform it so as to make it conform to the intent of the parties; and if the deed be to minor children, the correction will be made notwithstanding their infancy. *Worley* v. *Tuggle, &c.*, 4 Bush, 168.

27. "I, Philip McBee, having consented to the above sale, will at my death give as much land to W. McBee, as the vendee of my daughter Henrietta, as to any of the balance of my children." P. McBee died intestate. The purchaser is entitled to an equal interest in his land by virtue of his contract. *McBee* v. *Myers, &c.*, 4 Bush, 356.

28. A purchaser who has received a conveyance, cannot resist the payment of the balance of the purchase-money on the ground of defects in the title, unless the vendor is insolvent. (1 Dana, 393.) *Trumbo* v. *Lockridge*, 4 Bush, 415.

29. Contract bound vendor to convey to vendee and his lawful children. Vendee then had three children, and afterwards three more. The six children are entitled to six-sevenths of the land. *Cessna, &c.* v. *Cessna's adm'r, &c.*, 4 Bush, 516.

30. Vendee in possession under a bond for a conveyance can compel subsequent holders of title to convey to him. *Goins* v. *Allen, Morton & Co.*, 4 Bush, 608.

31. Land conveyed by an agent under a genuine power of attorney, the acknowledgment of which was defective, chancellor should compel a proper conveyance. *Colsten's heirs* v. *Chaudet, &c.*, 4 Bush, 666.

32. To recoup damages, resulting to the vendee of personal property from the failure of consideration, by plea to the action for the price, saves cost and delays, and prevents vexatious multiplicity. (2 Mar., 86; 4 Lit., 157; 6 B. Mon., 528; 12 Mon., 465.) *Miller* v. *Gaither*, 3 Bush, 152.

33. The court erred in rescinding the contract, when an exhibition of title was required, and a rescission was not asked. *Russell* v. *Shively, &c.*, 3 Bush, 162.

34. Auctioneer assured bidders that "he knew Wilson well, and he was all right, and that he would warrant that his title was good." The buggy having been stolen by Wilson, the assurances of the auctioneer were constructively fraudulent, and he is liable on the warranty. *Dent* v. *McGrath*, 3 Bush, 174. The

answer not controverting the want of title in Wilson and the owner's reception of the stolen buggy, there was no necessity of a judicial eviction. *Same*, 174.

35. The abolition of slavery was a contingency to be risked by the purchaser. *Thomas* v. *Porter*, 3 Bush, 177.

36. The vendor who has not conveyed the land does not lose his lien by renewing the notes and taking personal security. (4 Bibb, 303; 6 B. Mon., 67.) *Lusk* v. *Hopper, trustee, &c.*, 3 Bush, 179.

37. Vendor cannot enforce lien when he does not allege the terms of the contract of sale, nor that he is able to convey. *Williams* v. *Abrahams*, 3 Bush, 186.

38. Allegations in a cross-petition that plaintiff had not a good title, is tacitly admitted by failing to answer. *Calhoon* v. *Belden*, 3 Bush, 674.

39. Jones sold to Shivell a tract of land described in a deed in the Henry county court clerk's office, which was to be delivered to Shivell on payment of $2,000 on Dec. 25, 1863. Shivell died without paying any of the purchase-money. His representatives some time afterwards offered to pay and sued to recover the $500 for which Jones sold it above the price Shivell was to pay. *Held*—that they could not recover. *Jones* v. *Noble, &c.*, 3 Bush, 694. The contract should be mutually binding to be enforceable. (2 Mar., 345; 2 Bibb, 98; New on Contracts, 94.) *Same*, 694.

40. A deed that does not pass the legal title because purporting to be the deed of the agent, is a part of the contract, and binds the constituent as much as his bond would. *Casey, &c.* v. *Lucas*, 2 Bush, 55.

41. Private sales by trustee pass no title without the maker of the deed of trust unites in the conveyance. *Smith's ex'r* v. *Vertrees, &c.*, 2 Bush, 63.

42. There is no lien, unless the unpaid part of the purchase-money shall be stated in the deed. *Long* v. *Burke*, 2 Bush, 90.

43. Failing to state what part of the purchase-money remains unpaid, is a waiver of the lien. (18 B. Mon., 653.) *Maupin, &c.* v. *McCormick, &c.*, 2 Bush, 206.

44. "I am to have the privilege of extending the time of payment as long as I choose, by paying interest thereon annually

at the rate of six per cent." The privilege cannot be extended by the vendee to another person. *Same*, 206.

45. Vendee agreed and promised by parol to take up and pay a note which his vendor owed on the land. Such a promise is binding. *Jennings* v. *Crider*, 2 Bush, 322.

46. A vendor, supposing that he was the owner of the entire tract, conveyed one moiety of his interest therein to C., who conveyed to R. The original vendor owned only eight-twelfths. C. acquired one-twelfth after his sales and conveyances, which passed by privity and estoppel to his vendees. *Churchill, &c.* v. *Terrell*, 1 Bush, 54.

47. If property is exempt from execution, the vendee may recover the value thereof against a creditor of his vendor who has levied on and sold it. *Anthony & Co.* v. *Wade*, 1 Bush, 110.

48. Purchasers of land under an erroneous sale which is set aside, having paid the purchase-money, are entitled to a return of the same from the parties who received it. *Salter* v. *Dunn, &c.*, 1 Bush, 11.

49. Purchaser at sheriff's sale of encumbered property paid for it in depreciated currency. When it was redeemed, he was bound to receive back the same kind of currency, or its equivalent at the date of payment. (7 Dana, 301.) *Sandford* v. *Farmers' Bank, &c.*, 1 Bush, 335.

50. A vendee of personal property, who misrepresents the nature of visible defects, assuming to know their nature and extent, and misleads the purchaser—however ignorant he may be of the real condition of the property—will not be protected from his misrepresentation; and vendee can rescind. (9 B. Mon., 507.) *Phelps, &c.* v. *Quinn*, 1 Bush, 375.

51. The measure of damages for failing to receive and pay for property purchased, is the difference between the contract price and the actual value of the property at the time and place of delivery. *Williams & Davis* v. *Jones and wife*, 1 Bush, 621.

VENUE.

Objection to change of venue is waived by a subsequent appearance and failure to object to the jurisdiction of the court to which the action was transferred. *Vinsen* v. *Lockard & Ireland*, 7 Bush, 458.

VERDICT.

1. If there be evidence conducing to show a right of recovery, the plaintiff may insist on a verdict. (Stevens v. Brooks, 2 Bush, 109; Shay v. Turnpike Company, 1 Bush, 109.) *Shakers* v. *Underwood, &c.*, 11 Bush (Sept. 7, 1875).

2. Defective pleadings are cured by the verdict, where the facts established sustain the cause of action. *Escott & Son* v. *White, &c.*, 10 Bush, 168.

3. It is too late after verdict to object that blanks in petition were not filled, or that it contained redundant matter. *Elizabethtown & Paducah R. R. Co.* v. *Pottinger & Bro.*, 10 Bush, 185.

4. Verdict in a will case will be treated on appeal as verdicts in other cases. When a jury, under proper instructions, has rendered a verdict, it will not be disturbed unless palpably against evidence. *Broaddus' devisees* v. *Broaddus' heirs*, 10 Bush, 299.

VERIFICATION OF DEMANDS.

A judgment, like any other claim, must be verified against a decedent's estate; and before an action to revive the judgment can be brought, the same must be verified. *Curry's adm'r* v. *Bryant's adm'r*, 7 Bush, 301.

VOLUNTARY CONVEYANCES.

None but creditors can set aside conveyances because voluntary, in the absence of fraud. *Jones and wife* v. *Hill*, 9 Bush, 692.

WAIVER.

1. Defendant will be deemed to have waived his right to have an action, brought by a corporation or a non-resident, dismissed for failure to give bond for costs before suit entered—unless steps are taken to enforce it before judgment. *Shelly* v. *Newport Savings Association*, 11 Bush (Sept. 18, 1875).

2. When title to property is not to vest until payment of purchase-money, the vendor's right will not be affected by taking a personal judgment for the price. (Hilliard on Sales, 23.) *Vaughn, &c.* v. *Hopson*, 10 Bush, 337.

3. The right to make a motion to set aside an indictment is waived, if not made at the proper time. (Crim. Code, sec. 158.) *Commonwealth* v. *Smith, &c.*, 10 Bush, 476.

4. The homestead right may be waived by a conveyance, purporting to convey the whole estate, and without limitation in the deed or certificate; but if it appear that wife only relinquished dower, it will not be a waiver of the homestead right. *Robbins, &c.* v. *Cookendorfer, &c.*, 10 Bush, 629.

WAR.

1. It is not true, in the proper sense, that an alien enemy has no *locus standi* in court. If assailed there, he could defend there. The liability and the right are inseparable. This right to make defense involves the right to employ counsel, for without counsel no defense could be made. A married woman, left residing upon her husband's farm when he becomes and continues a public enemy, has authority to employ counsel to protect his property thus left in her possession; and the husband is bound for the fee. *Buford* v. *Speed*, 11 Bush (Sept. 28, 1875).

2. A trust, made during the late civil war, to secure the property of an absent husband for his wife and children, was originally enforceable, notwithstanding he was then a public enemy. (Crutcher v. Hord and wife, 4 Bush, 368; Roach v. Hudson, 8 Bush, 410.) *Buford* v. *Speed*, 11 Bush (Sept. 28, 1875).

3. Partnerships are dissolved by war. *McAdams' ex'rs, &c.* v. *Hawes*, 9 Bush, 15.

4. Belligerent relations between partners, during the late civil war, not only operated to dissolve or suspend partnerships then existing, but rendered it unlawful for such enemies actually or constructively to enter into new partnerships while such relations existed. *McAdams' ex'rs, &c.* v. *Hawes*, 9 Bush, 15.

5. The power of the courts of the states adhering to the Federal Union to entertain jurisdiction of suits against such of their

citizens as joined the Confederate army, is upheld by the decided weight of authority. *Thomas* v. *Mahone*, 9 Bush, 111.

6. The constructive notice necessary to give the courts jurisdiction to render judgments in suits instituted against persons who had joined the Confederate army, etc., was a question of legislative discretion. *Ibid.*

7. A judgment is not void because the attorney appointed to defend could not lawfully communicate with the absent defendant. *Ibid.*

8. Judgments to sell land of a Confederate soldier, on constructive service during the late civil war, are held to be valid. *Thomas* v. *Mahone*, 9 Bush, 111.

9. Absence within the Confederate lines was not that character of enforced absence which would render void the order of publication. *Ibid.*

10. Court of appeals will not recognize the idea that there is a general equity, growing out of the disturbed condition of Kentucky during the late civil war, which converts into trustees those who purchased property at judicial sales during that period. *Ibid.*

11. Resident creditors had the right to proceed, during the late civil war, against Confederate soldiers absent from Kentucky, and subject their property found in this State to the payment of their debts. *Ibid.*

12. Order for money in enemies' country is valid, when it did not authorize the transfer of money from one to the other belligerent. (7 Wallace, 447; 1 Paine's U. S. Cir. Court Rep., 156.) *Haggard* v. *Conkwright*, 7 Bush, 16.

13. War dissolves contracts of continuing performance, such as partnerships and affreightments. *New York Life In. Co.* v. *Clopton, &c.*, 7 Bush, 179.

14. But it does not avoid pre-existing valid contracts, which a single act such as the payment of a debt might perform. War did revoke Garland's authority to negotiate policies, but not to receive premiums for policies previously issued. *Same*, 179.

15. A Confederate soldier had no right, while permitted to remain within the Federal military lines, to violate the laws of the Federal Government, nor disregard its military regulations. *Ewing* v. *Litsey*, 7 Bush, 496.

16. Receiving currency of the Confederate government voluntarily, in payment of a debt, discharges it. *Same*, 496.

WAREHOUSEMEN.

1. Warehousemen's receipts are transferable by indorsement, with like effect and remedy as bills of exchange. (Act of 1869.) *Greenbaum Brothers & Co.* v. *Megibben*, 10 Bush, 419.

2. Warehousemen's liens upon goods must be set forth in their receipt. *Ibid.*

3. A warehouseman sold whisky, and took purchaser's note for the price, and gave him a receipt for the same, deliverable on the return of receipt and payment of charges. The receipt was indorsed to innocent holder to secure a loan. The note not being paid, the warehouseman refused to deliver the whisky on the return of receipt and tender of charges. The suit of innocent holder being transferred to equity—*Held*, that the whisky should be sold, and the proceeds applied first to the payment of the loan, and the balance, if any, to payment of purchaser's debt to the warehouseman. *Ibid.*

4. The delivery of warehouseman's receipt for property in store passes the title, and the warehouseman becomes bailee. (40 Ill., 325; 8 How., 400; 8 Cal., 614; 19 Ohio St. R.) *Newcomb, Buchanan & Co.* v. *Cabell, &c.*, 10 Bush, 460.

5. If the owner of the tobacco failed to dissent promptly, upon being informed of the sale, and failed within a reasonable time to inform the defendants of his dissent, it was a ratification —unless the defendants had been notified that the tobacco was not to be sold. *Clay, &c.* v. *Spratt & Co.*, 7 Bush, 334.

WARNING ORDER.

See PRACTICE IN CIVIL ACTIONS.

WARRANTY.

Rights of vendees with warranties, how adjusted in case of recovery against them. *Proctor, &c.* v. *Smith, &c.*, 8 Bush, 81.

WILLS.

1. Deeds procured to be made by the fraud and undue influence of a son over his father (then more than ninety years old), were properly set aside for those reasons; but still more, because the father had recently bargained with another son, then on his death-bed, to will all his property to his four daughters only, provided that dying son would will the whole of his estate to the said four daughters and the two sons, their brothers. (Cruise v. Christopher's adm'r, 5 Dana, 181; James v. Langdon, 7 Ben Monroe, 193; Gore v. Sumersall, 5 T. B. Monroe, 505.) *McGuire* v. *McGuire*, 11 Bush (April 17, 1875).

2. As to the jurisdiction of courts of equity in will cases, see Barnes, &c. v. Edwards, 17 B. Monroe, 640. Such jurisdiction was not only questioned, but in effect denied, in the case of Bowles, &c. v. Winchester (MS. opinion by Chief Justice Hardin, in 1872, '73 or '74.) It was erroneous to afford relief in this case, even if the jurisdiction be conceded. *Abbott, &c.* v. *Traylor*, 11 Bush (Sept. 27, 1875).

3. The chancellor has no jurisdiction to vacate or modify the judgment of a county court admitting a will to probate—except in two classes of cases, after action by the circuit court. *Ibid.* (Gen. Stat., chap. 113, sec. 37; Hughey v. Sidwell's heirs, 18 B. Monroe, 260.)

4. A will provided that estate, devised to children and heirs, through trustees, should not "be sold under any pretext," etc., and that "if either of the aforesaid legatees die without issue, the portion which he or they were entitled to is to go to the survivors equally." *Held*—1. Not an attempt to create a perpetuity, but to prevent alienation by life-tenants, and secure the remainder to testator's descendants; and 2. The devisees named each took a life-estate, with remainder to his issue in fee-simple; but in case either should die without issue, his portion should go to remaining devisees. Children of a deceased devisee took no part of the interest of a devisee dying subsequently without issue. *Best* v. *Conn, &c.*, 10 Bush, 36.

5. For undue influence over a testator, see *Broaddus' devisees* v. *Broaddus' heirs*, 10 Bush, 299.

6. In determining the question of mental capacity to make a will, an instruction, that "inequally in provisions of a will, etc., requires satisfactory evidence that it was the offspring of a disposing mind," is misleading. A testator having capacity to make a will, may dispose of his estate as he deems proper, and unequal disposition is only a circumstance for consideration in determining mental capacity. *Ibid.*

7. Verdict of a jury in a will case will be treated, on appeal, as verdicts in other cases. When a jury, under proper instructions has rendered a verdict, it will not be disturbed unless palpably against the evidence. *Ibid.*

8. A new trial will be awarded on the reversal of a will case by the court of appeals, except where there is no evidence to sustain the verdict; when it will be ordered to be probated or rejected without further proceedings. *Ibid.*

9. Where a testator instructed his executor to pay a certain debt barred by limitation, but not to pay interest thereon, only the principal can be recovered. *McDonald's ex'r* v. *Underhill's ex'r*, 10 Bush, 584.

10. The county court has no jurisdiction, on motion of the nominated executor, to make allowance to him for compensation for his services and attorney's fees incurred by him in his unsuccessful effort to probate the will. He must present his claims in a settlement of his accounts as fiduciary, or resort to a court of equity. *Gilbert* v. *Bartlett*, 9 Bush, 49.

11. Costs incurred by an unsuccessful effort to probate a will should be taxed by the county court, and paid out of the estate of the deceased. *Gilbert* v. *Bartlett*, 9 Bush, 49.

12. An executor named in an unprobated will is executor until that paper is pronounced invalid by the judgment of the county court. *Ibid.*

13. An executor nominated in the will has the right, before the will is admitted to record, to create accounts for funeral expenses and for the preservation of the estate, and he derives this power alone from being nominated in the will as executor. *Ibid.*

14. Though the will be adjudged invalid, and his qualifying as executor be thus defeated, he is entitled to a settlement of his accounts in the same manner as other fiduciaries, before being compelled to deliver up the estate. *Ibid.*

15. A devise of one-fifth of the residue of testator's estate, after satisfying provision for his wife and paying debts and funeral expenses, is not adeemed or satisfied by a subsequent advancement to the devisee by the testator during his lifetime. *Grigsby's ex'r* v. *Wilkinson, &c.*, 9 Bush, 91.

16. An advancement charged in the will can not be questioned by the devisee. *Ibid.*

17. The provision of the Revised Statutes, requiring the renunciation of the will by the widow within twelve months after probate, is not imperative. Its object was to facilitate the settlement and distribution of estates. The widow's right to dower by the statute is made to depend upon her renunciation within the twelve months. *Smither* v. *Smither's ex'r*, 9 Bush, 230.

18. A widow can make an election in a mode other than that pointed out by the statute. *Ibid.*

19. The chancellor may postpone the widow's right to renounce the will beyond the twelve months, "until the condition of the estate is ascertained by the confirmation of the commissioner's report of settlement." *Ibid.*

20. The emancipation of slaves by will invested them with their freedom. *Neely, &c.* v. *Merritt, &c.*, 9 Bush, 346.

21. The fund accumulated from the hire of emancipated slaves constituted no part of the assets of the estate of the testator, and the surety on the bond of the executor, not having covenanted for a faithful performance of his duties as trustee, was not responsible for his default in that regard. *Neely, &c.* v. *Merritt, &c.*, 9 Bush, 346.

22. A special power to dispose of property by will was not conferred by the following, in a conveyance by the husband and wife to a trustee for the use of the wife, to-wit, "to use, sell, or exchange, or to re-invest or otherwise dispose of the whole or any part of said property and effects, and the proceeds thereof, in any manner she may think proper." *Harris, adm'r* v. *Harbeson*, 9 Bush, 397.

23. "Special power" to dispose of by will, within the meaning of the statute, is a power which is specifically expressed, or as clearly and unequivocally manifested, of disposing by will of some particular estate. *Ibid.*

24. The statute authorizing the court of appeals to order a will to be admitted to probate against the finding of a jury is not in conflict with the "bill of rights;" nor does it violate the ancient mode of trial by jury. *Wills, &c.* v. *Lochnane and wife*, 9 Bush, 547.

25. A will, which postponed the division of the real estate for about twenty years, operated to vest an estate in fee in each of the five devisees, subject to the restrictions imposed by the will, and the powers and trusts conferred on the executors, and subject also to be defeated in the event of the death of the devisee without issue, capable of inheriting as provided in the will. *Duncan, &c.* v. *Kennedy, &c.*, 9 Bush, 580.

26. Parol evidence of the intention of a testator is inadmissible to construe a will, if there is no latent ambiguity. *Fogle's ex'r* v. *Fogle*, 9 Bush, 721.

27. "I bequeath to my wife Angelina and her three children, conjointly, all my estate, real and personal:" The wife took equally with the three children. *Proctor, &c.* v. *Smith, &c.*, 8 Bush, 81.

28. "I now give the said lot to my brother Samuel during his life, and after his decease I will said lot to his heirs:" The devise took effect, to the persons who were said Samuel's heirs, at the time of his death. *Feltman* v. *Butts, &c.*, 8 Bush, 115. S. had children when the will was made, and "heirs" was used for children. The order of court in this case shows that the will and codicil were proved by the same witnesses. *Same*, 115. Where wills were probated before the Revised Statutes, the rights of the parties must be determined by the laws then in force; and heirs and devisees are liable for all debts, etc., of the ancestor or testator, to the extent of lands acquired by descent or devise. *Same*, 115.

29. Testator sold land by bond to his brother, and inserted "this is all I intend for my brother." Afterwards, made a will, and devised one-half of his estate to his "kindred as the same would descend at law." The brother is entitled to a share equal with his mother and sisters, in the property devised to them. *Carlin's adm'r* v. *Carlin, &c.*, 8 Bush, 141.

30. Will by a married woman living apart from her husband, disposing of land conveyed to her by deed, but not technically

such as to constitute a separate estate, is sustained and established. The estate being otherwise impressed with the character of separate estate. *Hiram (of color), &c.* v. *Griffin, &c.*, 8 Bush, 262.

31. The will of a married woman is restricted in its operation to such estate as she is authorized by law to dispose of by will; and the judgment of probate could not itself give the will effect as to land which was the general estate of the testatrix. The probate or rejection of a will by the proper court is conclusive, while it remains in force, between all persons whether parties to the record or not. *Mitchell and wife* v. *Holder, &c*, 8 Bush, 362. And the heir was not estopped from controverting the will of a married woman, by acquiescing in her expressed intention of making a will, and by recognizing it as valid, some time after her death—there being no evidence that he induced the testatrix to make the will, or resorted to any other means to induce her to refrain from disposing of the property by the deed of herself and husband. *Same*, 362.

32. "My will is that my means be converted into bank stock. I wish it to be transferred to my children, who will have the use unconditionally of $1,000 to each of them; the interest of the balance they will have during their lives, and not to have liberty to will it as they please, or sell out for life-annuities. My object is to secure them against want during their lives." Part of the bank stock of one of the daughters was invested in real estate for the use and benefit of the daughter "and heirs" forever. The daughter has a separate estate in the property, and it cannot be alienated except to reinvest it for the separate use of the wife. *Hathaway, &c.* v. *Yeaman*, 8 Bush, 391.

33. "I give ..... unto Harriet Givens and her children forever, and if she should die and leave no heirs of her body, it is my will that all the land ..... I have given her shall go to my daughter, E. H., and her children." Mrs. G. had no children when the will was made, but she married, and with her husband conveyed the land and died, leaving children. She took a defeasible fee. *Moran, &c.* v. *Dillehay, &c.*, 8 Bush, 434. All the parts of a will must be made to harmonize if it can be done, and the intention of the devisor be gathered from the whole will;

and this intention must prevail, if agreeable to the rules of law. *Same*, 434.

34. A county court has no power, at a subsequent term, to vacate and set aside an order establishing a will. *McCarty, &c.* v. *McCarty, &c.*, 8 Bush, 504.

35. Estates tail are by statute converted into fee-simple. F. devised his estate to trustees and their successors forever, in trust for the use of his three daughters and their posterity forever, and if either should die without lawful issue, her part to go in trust to be held in the same way. This created estates tail. *Breckinridge and wife* v. *Denny & Faulkner*, 8 Bush, 523.

36. The devise was to testator's son and his heirs and assigns forever, and if he shall die without lawful issue, the land shall go to his sisters in equal portions, and if either or both of them be then dead, to the child or children of such dead sister. This created a defeasible fee. *Sale, &c.* v. *Crutchfield, &c.*, 8 Bush, 636.

37. "As to the remainder of my landed estate I make no provision for, more than it is my will and desire that my son J. and my grand-children by my daughter L. shall be deprived of any interest therein whatever." Testator intended all of his estate to go to his heirs at law, and J. and children of L. to be excluded from any part of the landed estate, although as to a portion of it there was no formal devise. The personal estate of which testator died intestate must be distributed according to the statute of descents; and as to advancements the will is not conclusive. *Clarkson, &c.* v. *Clarkson, &c.*, 8 Bush, 655. Heirs must take unless they are disinherited by express words or necessary implication. (18 Howard, 390; 3 Metcalfe, 155.)

38. A devise of an estate to an executor in trust for one person, with permission to the executor of affording to a third person the use of a part of the estate or the value of the use in monthly installments, did not vest in such third person any specific estate, legal or equitable, nor create any debt to her which either she or her creditors could enforce. (8 B. Mon., 56; 12 B. Mon., 479.) *White* v. *Thomas, trustee, &c.*, 8 Bush, 661.

39. Devise to survivors, in case of death in infancy or without issue. One child died childless before the testator, another died leaving children, and between that time and the death of his son

Y., eight others of the testamentary children died. It was proper to equally distribute the estate among the testator's surviving children and the children *per stirpes* of the dead children. *Harris, &c.* v. *Berry, &c.*, 7 Bush, 113. "Survivors" is a flexible term, not necessarily including the testator's surviving children only. (5 Dana, 429.) *Same*, 113.

40. An administrator with the will annexed may sell and convey real estate, even when discretionary power is given by the will to the executor to sell or not. (Smith v. Haywood, MS. opinion, winter term, 1869.) *Gulley* v. *Prather's adm'r*, 7 Bush, 167.

41. Bequest "in trust, to manage, invest and pay over to his brother 'Jarrett' and his children, from time to time, as he for the best interest of him or them from time to time shall deem most beneficial:" authorized the trustee to invest and reinvest the fund, in any kind of property according to his discretion; the beneficiaries are co-equal participants in the fund. *Luxon, &c.* v. *Wilgus, &c.*, 7 Bush, 205.

42. A testamentary writing is admissible as evidence, although not admitted to record, as an acknowledgment which might imply a liability to some extent. (4 B. Mon., 471.) *Thomas, &c.* v. *Arthur*, 7 Bush, 245.

43. A devisee cannot claim under and against the same will. *Faris and wife* v. *Dunn, &c.*, 7 Bush, 276.

44. Devise to the wife during her life or widowhood. She could not hold as devisee until she chose to marry, and then claim as if she had not so held or married. *Smith and wife* v. *Bone, &c.*, 7 Bush, 367.

45. Disposition of devised real estate, prohibited by the will for a specified time, upheld. *Stewart* v. *Barrow*, 7 Bush, 368.

46. Unreasonableness of the will is not intrinsic proof of the want of a disposing mind. *Munday, &c.* v. *Taylor, &c.*, 7 Bush, 491.

47. The legatee must fulfill an implied trust. *Same*, 491.

48. Will requiring no security from executor: In such case, court may require the executor to give security on its own motion, or on demand of some person interested in the estate. *Atwell's ex'r* v. *Helm, &c.*, 7 Bush, 504.

49. Devise to one in trust for another: Trust may be established and enforced on oral testimony. *Caldwell, &c.* v. *Caldwell*, 7 Bush, 515.

50. "The balance of the money arising from the sale of my personal estate, after paying my just debts, I desire that it shall be equally divided among my *children*." The testator had children and grand-children by other deceased children, when the will was written. The grand-children took no part of the personal estate under the clause of the will. *Hopson's ex'r* v. *Commonwealth for Shipp, &c.*, 7 Bush, 644.

51. A residuary devisee, charged with the duty of living with and taking care of his mother, etc., may transfer his residuary interest; and the trust reposed in him may, by her consent, be performed by his vendees. *Crawford* v. *Woods, &c.*, 6 Bush, 200.

52. He who has advanced money or performed services upon a promise to leave the party a certain legacy, may recover compensation upon the failure of testator to leave the legacy. And the undertaking will not be performed by a testamentary provision which is not *ejusdem generis* with that which is promised and made for a different object. The limitation does not begin to run until death of testator. *Myles' ex'rs, &c.* v. *Myles*, 6 Bush, 237.

53. Alexander died in Woodford county, Ky., in 1867, without wife or children, possessed of large estates real and personal in Kentucky, in other States, and in Scotland, leaving an only brother and two sisters to whom, by his last will published in March, 1860, he made sundry bequests and special devises. The means he intended for payment of his debts were otherwise appropriated in his life. *Held*—that the debts and special devises shall be paid by marshaling the assets, and applying them in the following order: 1. Personal estate not exempted expressly or by implication; 2. Lands specially devised and set apart for the payment of debts; 3. Lands descended. This applies to the "Cowden estate" in Scotland; 4. Lands specially devised. Heritable estate in Scotland does not pass by will; and the "Airdrie" estate in Scotland passes subject to a heritable bond of £15,000. Publication of the codicil was a republication of the will, as of date of the codicil. The legacy of

$5,000 to a little girl who died before the testator, lapsed by her death. *Alexander, &c.* v. *Waller, &c.*, 6 Bush, 330.

54. A daughter of testator died before the termination of the life estate given to his widow. The daughter's interest in the land descended to her children, and her husband was not tenant by the curtesy. *Moore, &c.* v. *Calvert, &c.*, 6 Bush, 356.

55. Testator devised to a trustee all of his estate for the use of his surviving wife for life, and died intestate as to the reversion, which passed to his children. A posthumous child died in infancy, and its interest passed to its mother, brothers, and sisters. *Sansberry's ex'rs* v. *McElroy & Rinehart*, 6 Bush, 440.

56. For the conversion of devised slaves, the executor and not the devisee can sue, since the Revised Statutes. *Pendleton's ex'r, &c.* v. *Pendleton's adm'r*, 6 Bush, 469.

57. The value of one-half of the land, was a pecuniary legacy to the daughters. One of the daughters having married, the legacy passed to her husband, and having survived his wife he was entitled to it. *Gray, &c.* v. *McDowell, &c.*, 6 Bush, 475. One of the devisees left Kentucky with a family in 1841, and joined the Mormons in Missouri, and has not been since heard of in Kentucky. These facts do not authorize the conclusion that he and his whole family were extinct in 1869. *Same*, 475.

58. Estate derived by grand-children under the will of their grandmother is not subject to a set-off of a debt due by their father to their grandmother. *Thatcher, &c.* v. *Cannon, &c.*, 6 Bush, 541.

59. If a specific legacy is alienated by the testator before his death, the law presumes an intention to adeem it, unless there be circumstances to repel this presumption. In Kentucky, the common law rule, that alienation adeems a specific bequest, does not apply to bequests to testator's heirs, unless he so intends; but a specific bequest to one not testator's heir in Kentucky is adeemed by alienation before testator's death. *Lilly* v. *Curry's ex'r, &c.*, 6 Bush, 590.

60. "The residue of my estate I will, etc., to the descendants of my three uncles B., W., and T. Their children or descendants are unknown to me. My desire is that this bequest shall go to such of their children as are living, and where a child of either has died leaving children, the children of such deceased

child shall take such part as their parent would take if living." One of the uncles left *three*, another *four*, and the other *seven* children. The fourteen children took *per capita*, and each one was entitled to an equal part of the estate. *Brown's ex'r* v. *Brown's devisees*, 6 Bush, 648.

61. Compensation fixed by the will: The executor is limited to the amount thus fixed. *Same*, 648.

62. Testator devised land to two sons, requiring them to pay $4,000. He considered the land worth much more than that amount; that sum being undisposed of, passed by descent to his heirs. The excess of the value of the land at his death should be charged to the two sons as an advancement, and they should receive no part of the $4,000 until the other descendants are made proportionably equal with them. *Renaker, &c.* v. *Lafferty's adm'r*, 5 Bush, 88.

63. Testator in 1850 devised all the land he then owned, after his wife's death, to eleven grand-children. He afterwards acquired other lands which he conveyed to one of the grand-children. Testator died in 1864. *Held*—he did not intend to make an advancement or adeem the devise to that grand-child, and he took an equal part under the will. The intention of the testator may be determined by parol evidence. *Thomas, &c.* v. *Capps, &c.*, 5 Bush, 273.

64. Youse died in 1865. He had kept a holographic will by him for several years. Several ineffectual searches were made for it after his death. Finally it was found with the name torn off. Several codicils in his own writing were written on the margin, and one of them had his name still to it. It was held that he had canceled the will, and thereby the codicil too. *Youse* v. *Forman, &c.*, 5 Bush, 337.

65. Parties appealed from an order of the county court admitting a will to record, and also assailed it by petition in equity. They were compelled to elect which they would prosecute. They dismissed the appeal. Thereupon, on demurrer, the court dismissed the petition in equity. *Cleveland's adm'r* v. *Lyne, &c.*, 5 Bush, 383.

66. Barnabas Johnson by will emancipated his slaves, and gave them most of his estate. The amended petition in equity alleged that a part of the slaves refused to be removed from the

State, although the will required it to be done. By the constitution and law of the State at Johnson's death, neither the emancipation nor devise could take effect without removal or assent of the slaves to be removed. *Walters, &c.* v. *Ratliff, &c.*, 5 Bush, 575.

67. Executors with no express power to sell have no authority to sell and convey real estate, which re-lapsed to heirs and distributees and did not pass under the will. *Buckner's ex'rs, &c.* v. *Cromie's ex'rs*, 5 Bush, 602.

68. The general rule is, that the will is to be construed according to the law of the place of the testator's domicile in which it is made. *Dannelli, &c.* v. *Dannelli's adm'r*, 4 Bush, 51. (Story's Conflict of Laws, secs. 479, a, d, e.)

69. "The share allotted to my son W. R. J. shall be retained by my executors, paying to him during life rents, etc., after his death to go to his descendants in the same manner as it would pass by the law of descents." The title to W. R. J.'s share remained in the executors, to him for life, with remainder to his daughter, who took under the will as though it had descended from J. R. J. His widow took a dower interest by implication, and the child took the other estate in fee. *Jacob* v. *Jacob, &c.*, 4 Bush, 110.

70. Testator devised that the residue of his estate should be equally divided between his children by name and his grandchildren by a deceased daughter, designating them by name. To equalize all of his devisees alike, he bequeathed to the two grand-children special legacies, the same as he had given to each of his children. *Held*—that each of the grand-children took the same as a child. *Wells, &c.* v. *Newton, &c.*, 4 Bush, 158.

71. The proceeds of land sold and requested to be sold were bequeathed to the separate use of three daughters. One of them married, and died without issue. Her husband was entitled to the proceeds of the land which had been sold and to her share of the proceeds of the land remaining unsold. *Green* v. *Johnson, &c.*, 4 Bush, 164.

72. "I give my wife as much of the remainder of my estate, after my debts are paid, as will be sufficient for her support during life. The balance, etc., I will to my daughter and her children. I authorize my executors to sell whatever property they may

think best to pay my debts, except my interest in my brother John's estate; that I wish to stand undisposed of for the benefit of my daughter and her children." The residue of the estate having been sold to pay debts, the widow was entitled to her support during life out of the rental of the interest of the testator in his brother John's estate. *McCasland* v. *Martin, &c.*, 4 Bush, 198.

73. Legatees having resisted the establishment of the will by a protracted litigation, are not entitled to interest on their legacies from one year after testator's death. *Commonwealth for Johnson* v. *Turley, &c.*, 4 Bush, 398.

74. None of testator's negroes emancipated were to have a right to sell their interest in the land devised to them; and if any moved off, or attempted to sell, the property was to remain for the others. Court properly dismissed petition asking for sale and partition of the land. *Robinson, &c.* v. *Johnson, &c.*, 4 Bush, 433.

75. The son who was incapable of taking at the time of the publication of the will, but capable at the death of the father, had a descendible and distributable interest equal to his brothers in his father's estate, and should be equalized with them. *Miller* v. *Miller, &c.*, 4 Bush, 482.

76. An ademption does not appear by the testator selling one of the devised lots, collecting, using and confounding the proceeds with his other personalty; and the entire proceeds should be regarded as part of his distributable estate. Ademption will not be presumed; it must appear. *Same*, 482.

77. "I will that my daughter L. M., and her children have my home farm at $25 per acre." "I will to my wife, etc., one-third of my whole estate." These clauses conflict. The widow was entitled to one-third of the real estate in fee, and Mrs. M. and her children are entitled to two-thirds of the home farm at $25 per acre. *Howard* v. *Howard's ex'r, &c.*, 4 Bush, 494.

78. Testator died, leaving a widow, a brother and three sisters. He devised to his widow sole possession of his estate during life, and made her executrix to pay his debts out of specified property; to sell his Southern property, retaining one-half of the proceeds for her sole use; the other half to be divided in equal portions between the brother, sisters, etc., and that from

the portions going to them, the several debts that his brother and husbands of his sisters owed testator, should be subtracted. Of his Kentucky farm and negroes, so much as might remain after paying debts he devised to his widow, one-half for life, with the right to will one-half of all his property in fee-simple, and the other half to be divided between his brother and sisters, etc. *Held*—the debts owing the testator by his brother and his sister's husbands are not included in the devise to his wife, but to go to his brother and sisters, to be thrown into *hotchpot* to equalize them. The widow is not vested with the freehold to the Southern property, but with the mere possession and curation without title; and the title thus undisposed of by the will descended to the brother and sisters as heirs. The devises to the brother and sisters were absolute. *Flournoy, &c.* v. *Flournoy, &c.*, 4 Bush, 519.

79. Real estate conveyed to a married woman, her heirs and assigns, is not such an estate as she can devise to deprive her heirs at law from taking it by descent. *Payne* v. *Pollard*, 3 Bush, 127.

80. "I give one-half of my estate to the Presbyterian Orphan Asylum of Louisville, and the remaining one-half to the House of Mercy of the city of New York. This devise sustained. *Cromie's heirs* v. *Louisville Orphans' Home Society*, 3 Bush, 365. It was meant for the Louisville Orphans' Home Society. *Same*, 365.

81. "The 42 acres shall in no way be disposed of by deed of gift or sale by her until she arrives at the age of 35 years." *Held* —valid, and could not be sold by the order of the chancellor, under the provisions of art. 5, chap. 86, Rev. Stat. *Stewart and wife* v. *Brady*, 3 Bush, 623.

82. T. devised a house and lot to G. and his wife, payment thereof by G. being acknowledged in the will. G.'s wife became owner of one-half of the house and lot, he having qualified as executor of the will. *Boyd* v. *Gault, &c.*, 3 Bush, 644.

83. Testator's debts and liabilities must be paid before legacies. *Smith's ex'rs* v. *Vertrees, &c.*, 2 Bush, 63.

84. The attesting witnesses to a will having by their attestation authenticated the document as a good will, and vouched the testator's capacity, are entitled to but little credence when they

depose to the contrary. Such persons deserve popular rebuke and legislative denunciation. *McMeekin, &c.* v. *McMeekin*, 2 Bush, 79.

85. "I direct that my wife have as much stock, etc., as she may think necessary for her comfort, etc." The widow claimed the entire personal estate, and purchased a tract of land for $5,500, and conveyed the land to her son in trust for his wife and children. *Held*—that his was a life estate, and the conveyance by the widow to her son of land which she purchased with money of the estate, was fraudulent, and should be set aside, reserving a life estate therein to her. *Scott, &c.* v. *Scott's ex'rs*, 2 Bush, 147.

86. Land directed to be converted into money will be so regarded, subject to the election of the devisees to treat it as realty or personalty; but without any election it is regarded as a money bequest. *Rawlings' ex'r, &c.* v. *Landes, &c.*, 2 Bush, 158.

87. "I wish my estate divided equally between all my children, A. E. H., S. J. D., P. M., and N. D. I leave G. M. D. $50. I hold his notes for $800 which I give him in addition to the $50. This is all he is to have of my estate." 1855 dated. In 1856, testator stated by a codicil, that he gave Edward $50 only, on account of his having been a disobedient son. In 1858, testator added "what I leave my daughter, A. E. H., I leave to her and her children, if she should have any, if none then at her death to return to my other children as above named." A. E. H. died childless. *Held*—that G. and E. D. had no interest in the share of A. E. H.; the same passed to the other four daughters named in the will. *Delph, &c.* v. *Delph, &c.*, 2 Bush, 171.

88. Delivery of promissory notes given *causa mortis* passes the beneficial interest thereto to the donee. Money in bank does not pass by delivery of the pass-book. (2 Met., 420.) *Ashbrook* v. *Ryon's adm'r*, 2 Bush, 228.

89. A testator can manumit slaves and then give them property by will. *Monohon, &c.* v. *Caroline* (*of color*), *&c.*, 2 Bush, 410.

90. Stewart by will gave to his wife "the sole control, management, and use of the income arising from his estate, without

accountability, for the support of herself and the education of their children." By codicil he gave her "the sole control of all the income from his estate, without accountability to any one." His wife took only a life estate. One of his daughters, who married and died, and left a child who died in infancy, left her husband surviving. He took no interest in Stewart's estate, either as tenant by the curtesy of his wife or heir of his child. *Stewart* v. *Barclay*, 2 Bush, 550.

91. In an action controverting the validity of a will in the circuit court, the successful party may be entitled to a new trial, on the ground of the discovery of new evidence, for the purpose of making the case stronger in the court of appeals. Gross inequality, apparently unjust and unreasonable, is not sufficient to invalidate a will; but is entitled, in proportion to its degree of flagrancy to some auxiliary influence on the question of capacity or fraud or controlling influence; and unexplained, and combined with corroborating evidence, may be entitled to great influence. *Kevil, &c.* v. *Kevil, &c.*, 2 Bush, 614.

92. The testator gave to his heirs at law his estate, excluding a nephew. The descendants of his sister resisted the claim of the descendants of a brother of the half-blood, on the ground that he was illegitimate. The law presumes that every child is the offspring of the lawful union of the parents. Reputation, to have any effect, must originate in the family, or from the conduct or declaration of relatives presumed to know the truth and to be disparaged by it. The testator treated the descendants of the half brother as if he had been legitimate, kept and cherished two of them in his family, and treated them as nephew and niece; and whether their father was legitimate or not, the testator considered them as of the class of "his lawful heirs." *Strode, &c.* v. *McGowan's heirs*, 2 Bush, 621.

93. A devise of an estate to a daughter, and if she should not live to have heirs of her body, the estate to be placed in the hands of trustees, &c.: She had no heirs of her body. The profits of the estate during her life did not pass under the will, but descended from her to her next of kin. *Lyne, &c.* v. *Cleveland's adm'r*, 1 Bush, 80.

94. To invalidate a will because of undue influence, the instrument must be shown to have been procured by importunity that

could not be resisted; but it need not be exerted at the time the instrument was written. *Turley's ex'rs, &c.* v. *Johnson & Lillard*, 1 Bush, 116.

95. "Bodily heirs," in George Palmer's will, construed to be synonymous with children or descendants. *Righter, &c.* v. *Forrester, &c.*, 1 Bush, 278.

96. Persons to whom a void devise is made are not necessary parties, in a proceeding to set aside a will. *Berry, &c.* v. *Hamilton*, 1 Bush, 361.

97. Testator gave to one son $300 more than to his other children, and to one daughter $300 less. The devises to this son and two others were conditioned, that "if they or either of them should die without any lawful issue, then the portions given to them and each of them is to belong to my other children and heirs at law, according to the law of descent and distribution in force in this State." The son that was to receive the $300 more died without issue. *Held*—that the daughter who was to receive $300 less than one-sixth should be made equal with the other heirs before they should receive anything from the son's portion. *Cole and wife* v. *Palmer's ex'r, &c.*, 1 Bush, 371.

98. Land acquired after making a will does not pass thereby, unless it appears from the will by reasonable inference that the testator so intended. *Flournoy's devisees, &c.* v. *Flournoy's ex'r, &c.*, 1 Bush, 515. The testator in this case used the words "their heirs forever," as words of purchase. *Same*, 515.

99. Land given to R. M. D., and if he should not have a legitimate heir of his body living at his death, the estate to be divided, etc. His widow was entitled to dower in the land, he having died leaving heirs from his body, and they took by descent from him, and not by devise from the testator. *Daniel, &c.* v. *McManama, &c.*, 1 Bush, 544.

WITNESS.

1. See EVIDENCE; and CRIMINAL LAW AND PROCEEDINGS.

2. The testimony of a deceased witness given at a former trial is competent evidence on a subsequent trial. *Keene* v. *Commonwealth*, 10 Bush, 190.

3. Proof that the family or associates of witness are in bad repute is inadmissible to impeach his character. *Keene* v. *Commonwealth*, 10 Bush, 190.

4. The distributee of an estate is not a competent witness for the administrator of his intestate in an action against another administrator. *Manion's adm'r* v. *Lambert's adm'r*, 10 Bush, 295.

5. The former law is unchanged, in that all persons are incompetent to testify against an administrator as to facts occurring before the death of the decedent, who were incompetent prior to the enactment of this law. *Manion's adm'r* v. *Lambert's adm'r*, 10 Bush, 295.

6. When a court has refused to permit a witness to answer a question, the court of appeals cannot consider the refusal prejudicial, unless it is shown what the witness was expected to state in answer to the question. *Manion's adm'r* v. *Lambert's adm'r*, 10 Bush, 295.

7. In impeaching a witness, his character before as well as after the time he testifies may be proven. *Manion's adm'r* v. *Lambert's adm'r*, 10 Bush, 295.

8. No case can arise where one party to an issue is allowed to testify as to matter affecting his adversary, and the latter is not permitted to testify as to the same matter. *Love* v. *Cummings*, 10 Bush, 578.

9. Before evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning the same, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and if it is in writing, it must be shown to the witness and he be allowed to explain it. (Code, sec. 662; 1 Greenleaf, 463.) *Murphy* v. *May*, *&c.*, 9 Bush, 33.

10. An opinion of a witness is not competent evidence. *Johnson* v. *Commonwealth*, 9 Bush, 224.

11. Husband and wife are not competent to testify against each other in any case where they are antagonistic parties. *Bassett* v. *Bassett*, 9 Bush, 696.

12. A notary is competent to prove that at the time of the protest he did not know the place of residence of the parties to the bill. *Mulholland & Bros.* v. *Samuels*, 8 Bush, 63.

13. On motion against an attorney to strike his name from the roll of attorneys, the witnesses should be separated. *Walker* v. *Commonwealth*, 8 Bush, 86.

14. A defendant is competent to prove that his co-defendants are not his partners. *Culbertson* v. *Holden, &c.*, 8 Bush, 161.

15. A surviving wife is competent, for the administrator of her husband, to prove facts which came to her knowledge during her husband's life, but not by reason of her confidential relations with him. *English's adm'r* v. *Cropper*, 8 Bush, 292.

16. The owner of baggage is a competent witness, in an action to recover it when lost. (Act March 2, 1860.) *American Contract Co.* v. *Cross*, 8 Bush, 472.

17. A trustee is a competent witness, by substituting his *cestui que trust* as plaintiff in his stead. *Arnold* v. *Bryant*, 8 Bush, 668.

18. Seduced daughter is a competent witness for her father; and it is not error to refuse to allow witness to prove that her sisters were of questionable character as to chastity. *Pence* v. *Dozier*, 7 Bush, 133. A witness should not be compelled to infamize himself. *Same*, 133.

19. One jointly indicted with others cannot be a witness for or against them, so long as the indictment remains undisposed of against him. (17 B. Mon., 318; 1 Met., 16; Greenleaf, sec. 363.) *Edgerton* v. *Commonwealth*, 7 Bush, 142.

20. Having a lien on a judgment, an attorney is not competent for his client. *Downing* v. *Bacon, &c.*, 7 Bush, 680. See now, sec. 22, chap. 37, General Statutes, 413. "No person shall be disqualified as a witness, in any civil action or special proceeding, by reason of his interest in the event of the same as a party or otherwise," etc.

21. ☞ All the cases which decide that witnesses are incompetent on account of interest are obsolete in this State, and will not be further mentioned. EDITOR.

22. Similarity of interest goes only to the credit of the witness. *Jarboe, &c.* v. *Colvin, &c.*, 4 Bush, 70; *Jennings* v. *Crider*, 2 Bush, 322.

23. A stockholder in a bank is a competent witness for the bank. (15 B. Mon., 641; 17 B. Mon., 48.) *Petitt* v. *First National Bank of Memphis*, 4 Bush, 334.

24. A witness may discharge himself generally on his *voire dire*, without the production of documentary proof. *Nuttall's adm'r* v. *Brannin's adm'r*, 5 Bush, 11.

25. A partner against whom a judgment has been rendered is competent for plaintiff against the firm. *Bacon, McClardy & Co.* v. *Hutchings, Duncan & Co.*, 5 Bush, 595.

26. Statements by a witness on his *voire dire* are not evidence before or for the consideration of the jury. *Whitaker* v. *Crutcher*, 5 Bush, 621.

27. In ordinary actions, a party may introduce his adversary as a witness, but he must confine his responses to the inquiries of the party calling him. Otherwise, the other party may be a witness on any new matter. (Civil Code, sec. 673.) *Hester* v. *Wallace*, 6 Bush, 182.

28. It is the duty of the court to prevent any unfairness or misconduct of a witness, and not to substitute the jury to determine it. *Young* v. *Commonwealth*, 6 Bush, 312.

29. A vendor of property is incompetent as a witness for his levying creditor, who offers him on the assumed ground of fraud. (16 B. Mon., 492.) *Weil & Bro.* v. *Silverstone, &c.*, 6 Bush, 698.

30. Attesting witnesses to a will are entitled to little credence, when called to testify against it. *McMeekin* v. *McMeekin*, 2 Bush, 79.

31. As the law does not allow a party to make evidence for himself, his conduct and declarations a few hours after the robbery are not admissible in his favor, to prove that he had been robbed of plaintiff's money. He is not a competent witness to prove the alleged robbery. *Tucker* v. *Hood*, 2 Bush, 85. (See sec. 22, chap. 37, Gen. Stat.)

32. Evidence of a remote vendor competent. *Carbon & Bettis* v. *Stout*, 2 Bush, 246.

33. A party may examine more than three witnesses, if he choose to do so, to the same fact, at his own cost. *Kash* v. *Miller & Richart*, 2 Bush, 568.

WORDS, MEANING OF.

The words "restless," "careless," "wanton," and "indifferent," do not imply will or intention, in the sense of the statute. For the meaning of the words "willful," "neglect," &c., see *City of Lexington* v. *Lewis' adm'x*, 11 Bush (March 30, 1875).

WRITINGS.

See EVIDENCE (9 Bush, 717).

APPENDIX.

[The following is a brief digest of cases decided and published between Jan. 1, 1876, and Feb. 15, 1876—after the foregoing part of the work was in press; and are included here to make sure of having all the cases in 11 Bush, which work has not yet gone to press.]

ADMINISTRATOR.

1. One, seeking the aid of his co-devisees in securing his appointment as administrator with the will annexed of decedent, and voluntarily offering to serve and promising to charge no commission, is not entitled to any compensation. *Bate* v. *Bate, &c.*, 11 Bush (Jan. 26, 1876).

2. No commission can be allowed by the court exceeding that fixed by law; except where the parties interested and capable of contracting have, by agreement, fixed on a fair and reasonable compensation, when the court should adopt the agreed sum. (3 Bush, 652.) *Bate* v. *Bate, &c.*, 11 Bush (Jan. 26, 1876).

AMENDMENT OF RECORD.

While an appealed cause was pending in the circuit court, an order, amending the record, by the county court was void. *Mitchell, &c.* v. *Bond, &c.*, 11 Bush (Jan. 11, 1876).

APPEALS.

1. No appeal can be taken from a county or magistrate's court directly to the court of appeals. The law authorizing such appeals was repealed by sec. 1, art. 22, chap. 27, Gen. Stat. *Rice, &c.* v. *Commonwealth*, 11 Bush (Jan. 7, 1876).

2. A judgment, declaring liens valid, adjudging priorities as between the parties, and ordering the attached property to be sold, is final; from which, one disputing the validity of the liens,

may appeal. *Hearn, Lee & Pinckard* v. *Lander, &c.*, 11 Bush (Feb. 3, 1876).

ARBITRATION AND AWARD.

An award made by parol submission (unless the arbitration attempted to divest the parties of some right or title to property that could only pass by a written agreement) is enforceable. Gen. Stat., chap. 3, did not repeal the common-law rule. (3 Mon., 256; 1 Met., 119; 5 Bush, 697.) *Thomasson* v. *Risk, &c.*, 11 Bush (Jan. 12, 1876).

ATTACHMENTS.

One who furnishes brick, lumber, etc., towards building a house upon a lot contracted for and in possession of appellee, but who has not yet received the legal title, may sue in equity and have attachment for his debt, without affidavit or bond. (Sec. 476, Civil Code.) *Jones* v. *Jeffries*, 11 Bush (Jan. 22, 1876).

BAIL.

See SURETY, on page 573.

BASTARDY.

One charged with bastardy executed bond, with surety, conditioned for the appearance of the accused, &c., and "to perform the judgment of the court." The accused being found guilty and failing to perform the judgment of the court, *held*, that the bond was forfeited. *Commonwealth for, &c.* v. *Douglass, &c.*, 11 Bush (Jan. 7, 1876). The case of the Commonwealth v. Sanders does not apply, as it was decided under the law in Myers' Sup., 63; this case is determined by the law as found in Gen. Stat., chap. 7, sec. 10.

BIGAMY.

1. Declarations of defendant as to a former marriage shall be considered by the jury in trials of indictments for bigamy. (11 Ga., 53; 14 Ala., 546; 16 Ohio, 172; 11 Me., 391.) *Commonwealth* v. *Jackson*, 11 Bush (Feb. 4, 1876).

2. The marriage of one indicted for bigamy may be proved "by the deliberate admission of the prisoner himself." (Greenleaf's Ev., vol. 1, sec. 204.) *Commonwealth* v. *Jackson*, 11 Bush (Feb. 4, 1876).

BONDS.

1. Sureties in the bail-bond of one charged with a crime are released by his re-arrest and imprisonment. (14 B. Mon., 363.) *Medlin, &c.* v. *Commonwealth*, 11 Bush (Jan. 6, 1876).

2. One charged with bastardy, having executed bond, with surety, for his appearance and "to perform the judgment," failed to perform the judgment. *Held*—that the bond was forfeited. *Commonwealth for, &c.* v. *Douglass, &c.*, 11 Bush (Jan. 7, 1876).

3. The Commonwealth was no party to, and is therefore not bound by, a contract—between the sureties in a bail-bond—that all, or none were to be bound. *Holandsworth, &c.* v. *Commonwealth*, 11 Bush (Jan. 12, 1876).

4. A bail-bond executed by a sheriff, justice of the peace, or attorney at law, is not void. The act (Sess. Acts, 1871–2, vol. 1, 17) exempting such officers is only directory. *Holandsworth, &c.* v. *Commonwealth*, 11 Bush (Jan. 12, 1876).

5. Surety in a bond, discharging an attachment, to perform judgment, was also surety in replevin bond after judgment. *Held*—no execution having been levied on the replevin bond within the year, the surety was released; and the judgment being satisfied by the replevin bond, there was no judgment to be performed, and surety in the former bond was not liable. (Burns v. Parish, 3 B. Mon., 8.) *Gray* v. *Merrill*, 11 Bush (Jan. 22, 1876).

COMMON CARRIERS.

"Received . . . at the depot of the Paducah and Memphis R. R., the articles marked or numbered as below . . to be delivered . . . . at Brownsville, Tenn., to F. E. Bryan, . . . he paying freight, &c.;" signed by the carrier's agent. The goods were transferred to a second carrier, and lost. *Held*—the Paducah & Memphis R. R. was liable for the loss. (Redfield on Railways, 116, 117.) *Bryan* v. *Paducah & Memphis R. R. Co.*, 11 Bush (Oct. 20, 1874).

CONTINGENT REMAINDER.

Where the life tenant, with full knowledge of all the facts, voluntarily created, in his own behalf, a claim against the estate of the remaindermen, judgment against the mother of infant remaindermen did not bar them of their right to share in the estate. *Johnson, &c.* v. *Jacobs, &c.*, 11 Bush (Jan. 26, 1876).

CRIMINAL LAW AND PROCEEDINGS.

1. See BIGAMY, on page 565.

2. Shooting at one man, maliciously and with intent to kill, and, missing him, wounding another, is not malicious wounding within the statute. *Commonwealth* v. *Morgan*, 11 Bush (Jan. 4, 1876).

3. Conviction for breach of the peace is a bar to prosecution for assault and battery, constituting a part of the same transaction. (5 Dana, 320; 1 Bishop Cr. Law, sec. 683.) *Commonwealth* v. *Hawkins*, 11 Bush (Jan. 6, 1876).

4. On an indictment for keeping a tippling-house, the evidence conduced to show that spirituous liquors were sold by retail to be drunk, and were drunk, at the place where sold. *Held*, that if, on the trial for the first offense, the evidence shows the latter to have been committed, the jury may find the defendant guilty of and punish him for the latter offense. (Gen. Stat., chap. 29, art. 35, sec. 8.) *Jackson* v. *Commonwealth*, 11 Bush (Jan. 6, 1876).

5. Re-arrest under a second warrant and commitment, for the same offense, of one charged with a crime who had been admitted to bail, releases the sureties in the bond. (14 B. Mon., 363.) *Medlin, &c.* v. *Commonwealth*, 11 Bush (Jan. 6, 1876).

6. Wounding, in sudden heat and passion, with a pair of blacksmith's tongs not an offense embraced by sec. 1, art. 17, chap. 29, General Statutes. *Commonwealth* v. *Hawkins*, 11 Bush (Jan. 6, 1876).

7. One found guilty of a breach of the peace would be in jeopardy a second time for the same offense, if afterward tried under an indictment for assault and battery. He could not be convicted of assault and battery without being again convicted of the breach of the peace. *Commonwealth* v. *Hawkins*, 11 Bush (Jan. 6, 1876).

8. The illegal use of one's house by his bailee, with the bailor's purchased consent and virtual co-operation, would in judgment of law be the bailor's act. (2 B. Mon., 417.) *Harlow* v. *Commonwealth*, 11 Bush (Jan. 7, 1876).

9. Every person who voluntarily aids in establishing and maintaining a bawdy-house is guilty of a misdemeanor. *Ibid.*

10. Failure to state the location of the house used as a bawdy-house is not a fatal defect; the law will presume that it is within the local jurisdiction of the court in which the grand jury returning the indictment was empanneled. (Crim. Code, sec. 131.) *Ibid.*

DOWER.

The widow is entitled to dower in the life estate which was devised to her husband, with remainder at his death to pass by the law of descents to his descendants. (Jacob v. Jacob, 4 Bush, 110.) And she will be so entitled, though her husband die without descendants. *Johnson, &c.* v. *Jacobs, &c.*, 11 Bush (Jan. 26, 1876).

EVIDENCE.

1. The marriage of one indicted for bigamy may be proved "by the deliberate admission of the prisoner himself." (Green-

leaf's Ev., vol. 1, sec. 204.) *Commonwealth* v. *Jackson*, 11 Bush (Feb. 4, 1876).

2. Declarations of defendant as to a former marriage shall be considered by the jury in trials of indictments for bigamy. *Commonwealth* v. *Jackson*, 11 Bush (Feb. 4, 1876).

EXECUTION.

1. In a suit for failure to return an execution, the notice of a motion must contain all the requisites of a petition (Terrill v. Cecil, 3 Met., 348); and plaintiff must aver and prove every fact necessary to show that the officer is liable. (18 B. Mon., 622; 4 Met., 259.) *Johnson, &c.* v. *Bradley*, 11 Bush (Feb. 2, 1876).

2. The provisions of sec. 7, art. 17, chap. 38, Gen. Stat., regarding damages for failure to return execution, are highly penal. He who seeks to enforce them must manifest his right, and nothing will be presumed in his favor. *Johnson, &c.* v. *Bradley*, 11 Bush (Feb. 2, 1876).

GUARDIAN AND WARD.

1. An infant ward has no lien, statutory or equitable, upon the estate of his guardian to secure the honest management of his property, and an honest account thereof at the termination of the trust. *Chanslor* v. *Chanslor's trustee*, 11 Bush (Jan. 29, 1876)

2. A ward has the right to claim the profits realized from the use of his money by the guardian, and he has the right to claim any specific article of property purchased with his money, although the guardian took the title to himself. *Chanslor* v. *Chanslor's trustee*, 11 Bush (Jan. 29, 1876).

3. A guardian confused his ward's funds with his own, and assigned all for the benefit of his creditors. *Held*—the ward not showing any profits derived from, or article purchased with, his money or estate, was entitled to no preference over general creditors in the distribution of guardian's estate. *Chanslor* v. *Chanslor's trustee*, 11 Bush (Jan. 29, 1876).

HABEAS CORPUS.

1. Writ of *habeas corpus* issued by one not authorized to issue it, is a nullity and may be wholly disregarded. *Bethuram* v. *Black, &c.*, 11 Bush (Jan. 22, 1876).

2. Justice of the peace has no authority to issue writ of *habeas corpus*, if there be a judge of the circuit or chancery court, or a police judge, or a judge of the county court within the county. *Bethuram* v. *Black, &c.*, 11 Bush (Jan. 22, 1876).

3. A person in prison is not entitled to a writ of *habeas corpus* as of course. It is a discretionary writ, to be granted only upon sufficient ground appearing on the face of the petition. (Bushel's case, 3 Black., 132; Sim's case, 7 Cush., 285; ex parte Kearney, 7 Wheaton, 38; ex parte Williams, 3 Peters, 201.) *Bethuram* v. *Black, &c.*, 11 Bush (Jan. 22, 1876).

4. One seeking the writ of *habeas corpus* on the ground of excessive bail must be denied it. The circuit court having fixed the amount of bail, a justice has no authority to revise the order. (7 Cush., 285; 3 Peters, 201.) *Bethuram* v. *Black, &c.*, 11 Bush (Jan. 22, 1876).

HOMESTEAD EXEMPTION.

Putting the husband's property into property purchased in the name of the wife, he being at the time insolvent, was voluntary, and fraudulent as to his creditors; and no valid claim to a homestead can exist, until the injury to those creditors is repaired. *Hearn, Lee & Pinckard* v. *Lander, &c.*, 11 Bush (Feb. 3, 1876).

INFANTS.

1. Judgment against the mother of infant remaindermen did not bar them of their right to share in the estate. *Johnson, &c.* v. *Jacobs, &c.*, 11 Bush (Jan. 26, 1876),

2. See GUARDIAN AND WARD, page 568.

3. Plea of limitation in an action for libel, was not available against an infant plaintiff, suing by her next friend, although more than a year had intervened between the speaking of the

slanderous word and the commencement of the action. *Hopkins* v. *Virgin, &c.*, 11 Bush (Feb. 3, 1876).

INSTRUCTIONS IN CRIMINAL CASES.

"If the jury believe . . . . . that the accused, willfully and with malice aforethought, shot at A. O. with the intent to kill him, and, missing his aim, wounded W. T. B., then he is guilty of a malicious wounding, &c." *Held*—properly refused; the language of the statute does not embrace the offense for which N. M. was put upon trial. *Commonwealth* v. *Morgan*, 11 Bush (Jan. 4 1876).

JUDGMENT.

A judgment is extinguished by the execution of a replevin bond. *Gray* v. *Merrill*, 11 Bush (Jan. 22, 1876).

JURISDICTION.

A transcript of judgment rendered in the quarterly court having been filed with the clerk of the circuit court, and execution having issued from the latter court and been returned "no property," the latter court had jurisdiction of a suit to subject to sale property contracted to be bought by the defendant, and of which he was in possession. (Civil Code, sec. 474.) *Jones* v. *Jeffries*, 11 Bush (Jan. 22, 1876).

LIEN.

Surety in a sale-bond, at execution sale, has a valid lien on property left with him by the purchaser, for indemnity for payments he may make on the bond. *Hearn, Lee & Pinckard* v. *Lander, &c.*, 11 Bush (Feb. 3, 1876).

LIMITATION.

Plea of limitation, in an action for libel, was not available against an infant plaintiff, suing by her next friend, although

more than a year had intervened between the speaking of the slanderous words and the commencement of the action. *Hopkins* v. *Virgin, &c.*, 11 Bush (Feb. 3, 1876).

MECHANIC'S LIEN.

One who does not claim, for materials, &c., furnished to his co-defendant, a lien until after the institution of suit and service of process upon both—will be postponed to the plaintiff's judgment. *Jones* v. *Jeffries*, 11 Bush (Jan. 22, 1876).

MORTGAGE.

The unsupported testimony of the mortgagee will *not* establish an alleged mistake in the mortgage—against proof that he was present while it was being written, and had it in possession for more than nine months before the alleged mistake was discovered—against the legal presumption that one accepting a deed knows what it contains—and against the evidence of the draughtsman, that he read the deed to the grantee. *Hearn, Lee & Pinckard* v. *Lander, &c.*, 11 Bush (Feb. 3, 1876).

OFFICERS.

The act (Sess. Acts, 1871–2, vol. 1, 17) exempting officers from executing bail-bond is directory only; and if such exempted persons tender themselves as bail, they will not be heard to say they are not bound. *Holandsworth, &c.* v. *Commonwealth*, 11 Bush (Jan. 12, 1876).

PLEADING.

Surety in a sale bond, in order to recover for indemnity on account of his suretyship, must allege that he has paid the bond or a part thereof. *Hearn, Lee & Pinckard* v. *Lander, &c.*, 11 Bush (Feb. 3, 1876).

PRACTICE.

Those claiming under defendant have a right to avail themselves of a defense made by him, which, if true, was sufficient to defeat plaintiff; and they could not be deprived of the benefit of that defense after the trial commenced, by defendant's answer being stricken from the files (because not sworn to) on motion of plaintiff and concurrence of defendant. *Hearn, Lee & Pinckard,* v. *Lander, &c.*, 11 Bush (Feb. 3, 1876).

RECORD.

See AMENDMENT OF RECORD, page 563.

RELEASE.

See SURETY, page 573.

REMAINDER.

1. See WILLS.

2. "After his death, the property, with the unexpended avails, shall be conveyed and paid to his descendants, if there be any such then living, in the same manner as it would pass by the law of descents if the same were to descend from him." "If there be no such descendants, then the same shall be conveyed and paid to his heirs." *Held*—that the heirs take the property in the same manner as it would pass by the law of descents. *Jones, guardian, &c.* v. *Johnson, &c.*, 11 Bush (Jan. 26, 1876).

REPLEVIN BOND.

See JUDGMENT, page 570; SURETY, page 573.

ROADS AND PASSWAYS.

The statute as to discontinuing, or erecting a gate across, a road, must be strictly followed; and if the proper notice be not

given, the order to discontinue a road or erect gates cannot be sustained. *Mitchell, &c.* v. *Bond, &c.*, 11 Bush (Jan. 11, 1876).

SUBSTITUTION.

Purchaser at execution sale, mortgaged the property bought to the surety in the sale bond, as indemnity for payments he should or might make on the bond, and also delivered personalty to the surety to hold as like indemnity: In such case, if the surety asserts his lien on the personalty, the creditors of the purchaser will be substituted to the surety's rights under the mortgage. *Hearn, Lee & Pinckard* v. *Lander, &c.*, 11 Bush (Feb. 3, 1876).

SURETY.

1. Re-arresting one out on bail, and committing him to jail by order of examining court, instead of surrendering him to the custody of his bondsmen, although such exercise of power be improvident and illegal, releases the bail. *Medlin* v. *Commonwealth*, 11 Bush (Jan. 6, 1876).

2. A surety for a debt, and against whom judgment has been rendered, and the judgment satisfied or extinguished by a replevin bond, is released from liability by the execution of the replevin bond—unless the bond be quashed in proper time to leave the judgment in full force. (2 B. Mon., 303; 1 Met., 253.) *Gray* v. *Merrill*, 11 Bush (Jan. 22, 1876).

3. A replevin bond is satisfaction of a judgment; and a surety who alone has replevied a judgment may maintain an action against his principal as if he had paid the debt. (3 B. Mon., 8.) *Gray* v. *Merrill*, 11 Bush (Jan. 22, 1876).

4. Surety in a sale bond, at execution sale, has a valid lien on property left with him by the purchaser for indemnity for payments he may make on the bond. *Hearn, Lee & Pinckard* v. *Lander, &c.*, 11 Bush (Feb. 3, 1876).

WILLS.

1. Devise of "about $30,000 to each of my sons, etc., ... during his life. After his death . . . . to be paid to his descendants, as the same would pass by the law of descents. If there be no descendants, then the same shall be conveyed and paid to his heirs." One of the beneficiaries died, leaving a wife but no descendants; *Held*—his widow was entitled to dower in the trust estate, held for the life of her husband. (Jacob v. Jacob, 4 Bush, 110.) *Johnson, &c.* v. *Jacob, &c.*, 11 Bush (Jan. 26, 1876).

2. Bequest of $30,000 to each of several sons for life, without the power of encumbering, anticipating or alienating the principal, and "after his death, the property, with the unexpended avails, shall be paid to his descendants, ... if no descendants, then to his heirs." *Held*—that turning over to the remaindermen $30,000 at the time of the death of the life tenant, would not fulfill the testator's intention. *Johnson, &c.* v. *Jacob, &c.*, 11 Bush (Jan. 26, 1876).

ALPHABETICAL LIST OF CASES

IN

TRIMBLE'S DIGEST.

[This List embraces all the Cases in 1st to 11th Bush.]

A.

B.

C.

D.

G.

I.

J.

K.

M.

N.

Q.

R.

T.

U.

V.

W.

Y.

Z.